

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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INTEGRATED COMMUNICATIONS &
TECHNOLOGIES, INC., et al.,

Plaintiffs,

v.

HEWLETT-PACKARD FINANCIAL SERVICES
COMPANY, et al.,

Defendants.

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Civil Action No.
1:16-cv-10386-LTS

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BEFORE THE HONORABLE LEO T. SOROKIN, DISTRICT JUDGE

STATUS CONFERENCE

Tuesday, April 24, 2018
2:53 p.m.

John J. Moakley United States Courthouse
Courtroom No. 13
One Courthouse Way
Boston, Massachusetts

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Official Court Reporter
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P R O C E E D I N G S

(In open court.)

THE DEPUTY CLERK: Today is April 24th, the case of Integrated Communications vs. Hewlett-Packard, civil action 16-10386 will now appear before this Court.

Counsel, please identify themselves for the record.

MR. JOFFE: Dimitry Joffe from Joffe Law, P.C., for the plaintiffs.

MR. MCGUIRE: Josh McGuire, also for the plaintiffs.

MR. CALLAGHAN: Anthony Callaghan from Gibbons P.C. on behalf of the defendants.

MR. SASO: Paul Saso from Gibbons P.C. on behalf of the defendants.

MR. GLASS: Stuart Glass, Choate Hall & Stewart, for the defendants.

THE COURT: Okay. So I have -- I read through the stipulation regarding electronic discovery protocol that you filed and noted within it a number of points upon which you seem to have disagreed, so I thought I would schedule a conference. But that's -- little time has lapsed since we changed the date for all of you.

So why don't you first tell me, is there any updates to that? Should I just go through the things that I've identified as issues, or have some of them been resolved

1 or narrowed?

2 MR. CALLAGHAN: None of them have been resolved,
3 Your Honor. The outstanding issues are still there.

4 THE COURT: So it pretty much stands where it did
5 when you filed that. Would that be fair?

6 MR. JOFFE: Correct, Your Honor.

7 THE COURT: All right. Fine. So then what we'll
8 do is I'll go through and raise with you the ones identified;
9 and then at the end of that, if there's other things that you
10 wish to raise, you can raise them.

11 So the first issues that I noted were -- one thing
12 that would be helpful in the future, when you file documents,
13 is page numbers, but -- so I'm referring to ECF page numbers.
14 So the ECF document is 149 on page 5, which is defendants'
15 position about defendants' request for discovery conference
16 with the Court. There are a couple of issues that the
17 defendants complain about with respect to clarity from
18 plaintiffs' counsel as to whether the ICT servers are no
19 longer available, or only backups have been lost; second,
20 with respect to which ICT custodian's e-mails were part of
21 the migration and which may have been destroyed; and third,
22 near the bottom of the page, about when and who was
23 responsible for the, quote/unquote, disposition of certain
24 computer hard drives.

25 And so then plaintiff, Mr. Joffe, you have your

1 response generally to their issues. And I -- I guess what I
2 would say to you is those issues, one way or another, need to
3 be clarified. In other words, you can clarify them,
4 Mr. Joffe, to their satisfaction, right? They're fair
5 questions to ask, and it may be that there's perfectly -- I
6 have no view as to what the answers are, as to whether there
7 was any misconduct, but you need to clarify them. Like you
8 know that you can clarify them by talking to them. And if
9 they're satisfied, they're satisfied. If they're not, they
10 can serve you with interrogatories, or they can take
11 deposition testimony. In other words, you can do it the easy
12 way or the hard way, but there's only one way it's going to
13 be done.

14 Those are reasonable things for them to figure out.
15 If computers were disposed of, there may be perfectly -- it
16 may have been old, and there was perfectly reasonable methods
17 and explanations, and it might not implicate anything. But
18 it's a fair topic for discovery. And if you don't satisfy
19 them, they're going to take the under oath testimony of your
20 clients to figure it out. So you decide which way you want
21 to do it.

22 But like what I would say to all of you is that
23 this was filed on August 6th, and part of what you said,
24 which seemed reasonable to me at the time, Mr. Joffe, was
25 that you thought a conference was premature, because I

1 took -- and you said particularly since they haven't
2 responded to -- the defendants haven't responded to your
3 deficiency letter about certain discovery responses. So I
4 guess I'd say two things about that.

5 One is, what I took that to mean, premature about
6 these issues, is that you would all be engaging in it. But,
7 well, nothing's been resolved. I don't know whether there's
8 been information to clarify, and they're not satisfied.

9 And what I would suggest to all of you is, really,
10 if Mr. Joffe is giving you information and you're not
11 satisfied, then you're -- I think what you have to do is take
12 discovery on that. In other words, you, you know -- you
13 ask -- you refer to like -- you believe that if destruction
14 overriding or non-migration, if there was some of that, it
15 might be spoliation and that might warrant the severest of
16 possible sanctions. But I think you know that that just
17 depends. Right? It depends on, (a), whether it happened,
18 and (b), if it happened, why it happened.

19 It would be wholly different if you proved to me
20 with admissible evidence that someone has intentionally
21 destroyed evidence that they -- that was subject to a
22 spoliation order, and they knew they shouldn't destroy. It
23 would be completely different if they got all computers back,
24 migrated what they thought was useful, and years before there
25 was litigation, they threw the old computers away. And I

1 don't know whether that's right or wrong, and there would be
2 inferences from that, but those are not the same situations
3 and you know that. And so sure, if what your point is that,
4 if they spoliated things, there could be sanctions, there
5 could be. But I think Mr. Joffe knows that.

6 So I guess my perspective is, you need to be
7 practical. So they want to know what happened to those
8 things; you need to tell them. If you don't tell them,
9 they're going to take discovery on it, which is fine. And I
10 will let them take extra discovery on it, if they want to
11 take phased discovery. Do some of that first, before they
12 get to sort of the subject, I would be open to that, if
13 that's what it takes to figure it out. Because ordinarily
14 these are things that you all ought to mostly be able to
15 figure out and explain to each other's satisfaction.

16 With respect to them not responding to deficiency
17 letter, I would say just two things as a general matter,
18 since it seems that this is a case that may require more than
19 the usual amount of attention.

20 MR. CALLAGHAN: Your Honor, just to clarify that
21 issue. We did not see that as something that was before the
22 Court today. We have --

23 THE COURT: I don't view it as before the court. I
24 don't expect you to argue it.

25 MR. CALLAGHAN: We have, in fact, responded, and

1 we've conferred with our own deficiency letter. So that's
2 something we've agreed to talk about in the next two days.

3 THE COURT: Perfect. So that's great. The only
4 point that I make about that is, I don't view discovery as
5 pay to play, so to speak. What I mean by that is you serve
6 discovery on them. If you're unhappy with their responses,
7 and you've had the appropriate back and forth and conferral,
8 you can come to court and complain. It is not a defense for
9 the defendants to say to me, in response to your motion to
10 compel: Judge, they were deficient, too.

11 Okay. I don't view it -- I understand how big
12 firms work, okay, and I understand how people in New York
13 practice law. I practiced law there. I understand how
14 people practice here. I understand. I was not born
15 yesterday. So in my view, it is wholly inappropriate for
16 lawyers to withhold evidence because they think the other
17 side is withholding evidence. And I'm not saying anyone is
18 doing that, but I view that as wholly inappropriate.

19 I also view it as utterly irrelevant to Mr. Joffe's
20 motion to compel, if he made one -- and we haven't reached
21 there yet -- for you to say he's not been responding to his
22 request. If his request is a valid request, I'm going to
23 decide his motion to compel on the merits. The response for
24 you, if he hasn't done it, is move to compel.

25 And likewise, you're -- it's no defense to them

1 complaining about yours, if you haven't done it. I'm not
2 saying you haven't done it. But in other words, that comes
3 up sometimes in litigation. I find it, I'm telling you all
4 now, it's a waste of your clients' money and the ink. I'm
5 not interested.

6 If what you say to me is:

7 Judge, we don't think you should have discovery
8 conference on Monday, May 5th, because we're just about --
9 we're pretty much, by Monday, May 5th, would be ready with
10 defendants' issues, we'll have joined them and they'll be
11 ready. We're not going to have them all resolved, we've
12 narrowed them as best we can, but there's issues to decide.
13 We have some issues, too. We think, from an efficiency
14 perspective, making our clients pay for all of you, five of
15 you, to come to court would be cheaper to have them come
16 once. We'd rather do it on May 15th or May 25th or May 12th,
17 or whatever, because by then, we'll have joined the other
18 half of the issues, and then we can address everything with
19 you once. It would be more efficient and we'd rather do
20 discovery once.

21 And yes, perfect sense.

22 So I guess what I would tell you all, with respect
23 to the issues about this, is, I don't see -- is it *Callaghan*,
24 or *Callaghan*?

25 MR. CALLAGHAN: *Callaghan*, Your Honor.

1 THE COURT: *Callaghan*, I'm sorry.

2 Mr. Callaghan, I don't know exactly what you want
3 me to do here, other than what I've said. In other words, if
4 Mr. Joffe isn't giving you answers to explain these things to
5 your satisfaction, I think that these are things that you're
6 entitled to know the answers to, but what do you want me to
7 do?

8 MR. CALLAGHAN: Your Honor, to the extent that we
9 don't get satisfaction, and we haven't, we would ask that we
10 be allowed to probe that very issue before we start getting
11 into a plethora of other issues in discovery. Because if
12 there is a destruction of computer equipment, a destruction
13 of e-mails, a destruction of documents, and a migration and
14 an overriding -- overwriting of memory devices, if all of
15 that happened, we believe that should be the stuff of
16 spoliation, because this was supposed to have happened at
17 some undetermined date.

18 THE COURT: Let me ask you this, though.

19 MR. CALLAGHAN: Yes.

20 THE COURT: If you -- but how does that change? I
21 understand that you might take that discovery, and if it
22 turns out the way part of you hopes it turns out, that it
23 would give you -- you would then be coming to me with a
24 motion to say that I should throw this case out, or I should
25 do some other severe as possible sanctions, in your words. I

1 should impose those. Right?

2 But how does that, in the meantime, change the
3 course -- in other words, the discovery that you do take,
4 either if I denied your request for sanctions and said no
5 sanctions are appropriate, or the discovery that you'd be
6 taking as you're on course to move this case to a trial,
7 until I gave you everything you wanted or something in
8 between on your motion, how would it be affected by this
9 discovery about this topic?

10 MR. CALLAGHAN: Well, Your Honor, I hear what Your
11 Honor said about it's not a *quid pro quo*, and it's not a you
12 give me this and I'll give you that. And we understand that,
13 Your Honor. But there is a certain burden on the plaintiff
14 to prove their case and to establish that they have a basis
15 to get judgment on the case.

16 And here you have an instance where Your Honor,
17 yourself, recognized it, as early as 2013, the parties were
18 in the zone of litigation, litigation was in the distance.
19 And there was even a demand -- a settlement demand made by
20 the plaintiffs, or on behalf of the plaintiffs, in November
21 of 2013. So the writing is on the wall. And then we turn
22 around, and in 2014, there's a migration of e-mail, there's a
23 migration of data, there's a destruction of computers.

24 And what we're saying, Your Honor, is because of
25 all of those circumstances, we believe that the plaintiffs,

1 having asserted their theories, should be forced to put their
2 proofs out, and if those proofs don't exist and they don't
3 exist -- if we find that they don't exist, or we believe that
4 they don't exist for nefarious reasons, then we would be in a
5 position, Your Honor, to come back before the Court and seek
6 the severest of sanctions, which would be up to and including
7 a dismissal of the case.

8 So we feel as if, if that were probed, if we could
9 probe that issue, we would be in a better position to maybe
10 allay the remainder of the case. Perhaps that's
11 self-serving, but that's our view in terms of how that might
12 play out, Your Honor.

13 THE COURT: All right. So this is what I'd say
14 about that. I think that this issue should be resolved.
15 When I say "this issue," what I mean is the answers to these
16 questions that appear on page 5 that they've raise, you're
17 going to have to answer those questions in one form or
18 another, Mr. Joffe. They're relevant things for them to
19 probe into.

20 And so it's -- you need to -- it's your decision
21 about how you resolve those. You can provide them the
22 explanations by way of just, you know, attorney communication
23 and representation like you both do on many issues, and if
24 that satisfies them, that satisfies them. You can -- but if
25 it doesn't satisfy them, then they're going to take

1 discovery. The only real question is, in what sequence do
2 they take the discovery. Right? They're certainly going to
3 be able to take it in conjunction with everything else.

4 So I would urge you all to first try to talk to
5 each other, to at least -- I mean, it's really you,
6 Mr. Joffe, to see if you can solve it. Because what I hear
7 them saying is that they're going to ask -- they're going to
8 file a motion to say that they should get some certain
9 focused discovery on this topic, before all the regular
10 discovery begins. I'm not resolving that question now,
11 but -- but, you know, you're the plaintiff.

12 MR. JOFFE: Yes, Your Honor.

13 THE COURT: And presumably, you want to get to
14 judgment, right?

15 MR. JOFFE: I do, Your Honor.

16 THE COURT: And so presumably, then, you want to
17 eliminate hurdles.

18 MR. JOFFE: I do.

19 THE COURT: So one way to eliminate is that maybe
20 you can answer these things and narrow it.

21 MR. JOHNSTON: Yes.

22 THE COURT: Or you -- and so see. So why don't we
23 do this: Why don't you talk to each other about that, and if
24 you -- I'll give you, say, a -- if you -- what I hear you
25 likely to put before me is a request to stage the discovery.

1 MR. CALLAGHAN: That would be correct, Your Honor.

2 THE COURT: All right. If you want to file that
3 motion to stage it on this issue, then, you know, how much
4 time do you need to talk to each other? Do you need to talk
5 to each other to see if we can resolve the issue before you
6 get to filing such a motion? And part of resolving it is
7 seeing whether these things have answers that satisfy them in
8 some way or not.

9 And how much time do you think you need to talk to
10 each other about that.

11 MR. JOFFE: Well, I'll be happy to talk to them.
12 My only objection to having conference today was that it was,
13 in my view, a bit premature, because they've bombarded me
14 with clarifying questions. It's not just asking clarifying
15 questions, I have resent e-mail with overall six categories
16 of questions, five sub-questions in each. So it's like 30
17 more interrogatories that I have to respond.

18 And my concern was that, when I'm trying to respond
19 and get information from various groups of plaintiffs located
20 throughout, and then I don't have time to answer all of the
21 detailed questions. And I tried, and one of them, I said I
22 will follow-up, following up. They used that as the reason
23 to run to the Court immediately, and run to the Court on
24 absolutely -- with no absolute basis.

25 They're saying that ICT reports do not have any

1 relevant data or may not have any ESI to produce. That's not
2 true. We have plenty of ESI to produce. We have plenty of
3 relevant data. This is all pure speculation, based on the
4 fact that I was not quick enough on their beck and call, when
5 they send me 30 questions to answer, including questions that
6 have no relevance to discovery and are completely not
7 proportionate.

8 I'm not opposed to doing it in cooperative and
9 practical manner, Your Honor, at all. And I'll be happy to
10 engage in discussions with them, because we have many, many
11 questions about their proposed ESI product on our own. For
12 example, the custodians that they want to give us, their
13 description of their own system is just, you know --

14 THE COURT: Remember what I said, Mr. Joffe?

15 MR. JOFFE: What?

16 THE COURT: Remember what I said?

17 MR. JOFFE: Yes.

18 THE COURT: What does their system have to do right
19 now with their questions about yours?

20 MR. JOFFE: No, no, no. I was referring, Your
21 Honor, to a practical way of resolving.

22 THE COURT: Yes, I agree with you. So there's a
23 lot of practical questions. And so how many of these
24 questions that I identified here have you resolved or looked
25 into since April 6th?

1 MR. JOFFE: I think, since that time, they've
2 responded to our deficiency letter.

3 THE COURT: No, I'm talking about the ones on
4 page 5.

5 MR. JOFFE: Since April 6th.

6 THE COURT: That's the date that you filed this.
7 So on that date, you responded in the way you did, which is
8 fine. But what I understand your response to be is that you
9 describe many things you do have, and I don't -- I'm not --
10 by highlighting the issues they're complaining about on this
11 topic, I'm not saying I agree with them, either that they're
12 correct that your clients did anything wrong, or they're even
13 correct that I should stage the discovery. But I'm
14 highlighting that they raised these things, which seemed like
15 reasonable questions.

16 For example, how did the hard drives get disposed
17 of, or what custodian's e-mails were part of the migration,
18 and which ones were destroyed? Or what about current
19 employees or not? And those are practical questions. In my
20 experience, before you embark on electronic discovery, the
21 more things you can plan out and figure out and resolve in
22 advance, the cheaper it is, because it's an expensive, time
23 consuming process, and you don't want to do it twice. And so
24 my only point is --

25 I guess my other point is this. The way these --

1 the way cases work -- which I know you know, you brought the
2 case, which is fine. I'm happy to come here every day, and
3 you're certainly -- like the case before that I heard just a
4 few minutes ago, presents many interesting questions, but
5 cases are hard work. That's the way it works. They're hard
6 work for defendants, they're hard work for plaintiffs,
7 they're hard works for the court.

8 And the way, you know, you're going to have to
9 deal -- you've brought claims that are challenging them,
10 which is that's what plaintiffs do. And they are -- these
11 are important claims to your clients, with a lot of potential
12 money at stake. People's liberty -- although the case
13 doesn't put someone's liberty at risk now, it involves
14 questions of liberty, and so they're, you know, fighting it
15 hard. And so -- which is what you would expect. And just
16 the way you were fighting it hard.

17 But so my point is only you got to talk to each
18 other about those things, because they're not joined in a way
19 that I'm going to resolve at the moment. But I think you
20 need to talk to each other about those issues.

21 One issue that was brought to my attention in that
22 was this question about personal electronic devices. And so
23 I'll give you a couple of general -- because I take it that
24 issue stands where it did when this was filed?

25 MR. JOFFE: Well, to the extent it's not

1 reciprocal, because otherwise, we've agreed that personal
2 electronic devices will be within category of inaccessible
3 data, but for some reason, now it only works for defendants.
4 For plaintiffs, they want to search --

5 THE COURT: So let me explain why it's not
6 reciprocal to Mr. Joffe. If you want the psychiatric records
7 of Mr. Gill, on the present record, do you know what the
8 answer is?

9 MR. JOFFE: Not Mr. Gill --

10 THE COURT: He's a defendant, right?

11 MR. JOFFE: Right.

12 THE COURT: And if you want his psychiatric
13 records. I have no idea if psychiatric records exist. But
14 do you know what my answer is if you want them?

15 MR. JOFFE: I don't know, Your Honor.

16 THE COURT: You don't know. Do you have any idea,
17 based on your experience as a lawyer, your familiarity with
18 the issues, and the principles of law that might govern that
19 request?

20 MR. JOFFE: Well, it's disproportionate to the
21 discovery.

22 THE COURT: Would it perhaps not be relevant?

23 MR. JOFFE: Not relevant.

24 THE COURT: Relevance would actually be before
25 proportionality, perhaps?

1 MR. JOFFE: Yes.

2 THE COURT: Right. So in fact, can you think of
3 any nonfrivolous argument that you could make that would make
4 Mr. Gill's psychiatric records, based on the present record,
5 relevant for discovery?

6 MR. JOFFE: No, but I'm not looking for them.

7 THE COURT: And you're not looking for them,
8 exactly. But your clients' psychiatric records, if they
9 exist, some of your clients, those who brought claims of
10 mental and emotional health, possibly would be relevant. I'm
11 not saying that they are relevant, but would you agree with
12 me that they're possibly relevant?

13 MR. JOFFE: Sure, Your Honor.

14 THE COURT: Right. And so it's not a reciprocal
15 issue.

16 MR. JOFFE: No, no, no. I'm not -- I didn't mean
17 the subject matter of the search, I mean the media on what
18 the search is conducted.

19 THE COURT: So my point is reciprocity is not
20 really -- I don't see why -- discovery is not governed by
21 principles, if you give that, we have to give that.
22 Discovery is governed by what are your claims, what are your
23 damages, what are you seeking with respect to those, what are
24 the defenses, and what things are put in play by the
25 defenses.

1 So here the claims are business claims. The claims
2 arise out of a business transaction. So in the ordinary
3 course, I would think that the discovery on your clients is
4 focused on business devices, and on their client it is
5 focused on business devices. And until that -- the way I
6 would view this, like any commercial litigation case, until
7 someone shows me that a business person was using their
8 personal phone to do business, you wouldn't have to subject
9 your personal phone to discovery.

10 So for example, if one of you was sued for
11 employment discrimination in the course of your law practice
12 or malpractice -- god forbid, in the course of your law
13 practice, or breach of contract in your lease on your office,
14 I would ordinarily assume that your personal phone and your
15 personal papers at home, that are unrelated to your law
16 practice, are not subject to discovery, and you wouldn't have
17 to look through them, unless someone showed some reason why.

18 But in this case, what strikes me as different is
19 that some of the claims as to some of the plaintiffs, advance
20 claims that, with respect to personal things, not only with
21 respect to business things. So as with respect to the
22 personal things, then I would think that the question isn't
23 really -- it would be different. That principle that we
24 wouldn't ordinarily look -- it's a business case, you look at
25 business things -- wouldn't apply any longer. That doesn't

1 mean that everything they have is subject to discovery, but I
2 don't know --

3 For example, if your client went and sought --
4 bring some of the claims for mental and emotional health,
5 went to a counselor, presumably they might have paid for that
6 personally. That would be a reasonable possibility.

7 Would you agree with me?

8 MR. JOFFE: Yes, Your Honor. Of course. And we'll
9 produce responsive documents.

10 THE COURT: And you'll produce those records,
11 right?

12 MR. JOFFE: My only concern is it's not the subject
13 matter. We're in a position to search more various devices
14 that the defendant is not. We're put under the burden and
15 expense of going and searching the devices that the parties
16 agreed to exclude from the general media search. I'm sure
17 that they will have some relevant information on backup
18 tapes. We decided that backup tapes would be inaccessible --
19 well, with some proviso that --

20 THE COURT: Right.

21 MR. JOFFE: But this is exactly that issue, whether
22 it's reasonable, accessible, or not.

23 THE COURT: In my view, that argument is not the
24 same. So in my view, backup tapes you all made an agreement.
25 With respect to business backup tapes, it makes sense. I

1 think that was a prudent decision and you have certain
2 exceptions, and I'm not going to upset the arrangement you
3 made on that.

4 Here you disagree on whether -- what I understand
5 the dispute to be is defendants say, as to those plaintiffs
6 who are bringing claims for physical, mental, and emotional
7 health damages with respect to their physical, mental, and
8 emotional health. You don't want their personal electronic
9 information to be categorically excluded from the subject of
10 discovery. And what I understand the plaintiffs' position to
11 be is it should be equal. Either nobody has -- it should be
12 like backup tapes, either no one searches the personal
13 devices, or everybody searches the personal devices.

14 MR. JOFFE: Yes, Your Honor. In our view that
15 would be a proportionate approach to discovery.

16 THE COURT: So I guess my view is that
17 proportionality is, at first, irrelevant to this
18 determination. The first determination is relevance.
19 There's nothing before me that suggests that the personal
20 devices of any of the defendants have relevant information.
21 At this stage of the proceeding, no one has suggested that.
22 And so it's not to say it's inconceivable that there isn't a
23 stray e-mail or something on someone's personal device, but
24 that would be disproportionate, and there's no reason to go
25 to that end.

1 But the plaintiffs here who brought claims for
2 damages of personal, mental, and emotional health. I can
3 think of no conceivable principle, which is the line that
4 you're attempting to draw, Mr. Joffe, that says -- there is
5 no principle that says personal documents are off limits from
6 discovery. You're not making that argument. I understand
7 that. You're not making that argument, because such an
8 argument would be frivolous.

9 MR. JOFFE: I'm not making it.

10 THE COURT: And you're not making it. I understand
11 that. What you're saying is that it's disproportional to
12 look at electronic devices, because it's too burdensome
13 unless it's reciprocal. I reject the reciprocal argument. I
14 think, in this context, it makes no sense. With respect to
15 the proportionality argument, it's not grounded in anything.
16 The proportionality argument you're making is grounded in
17 your reciprocal argument, which doesn't make sense, with all
18 due respect.

19 If what you're trying to say, but haven't said, is
20 that, Judge, the particular clients I have, the kinds of
21 things that they might have that would be appropriate and
22 responsive to physical, mental, and emotional discovery, are
23 not likely to be on their electronic devices, and therefore,
24 it would be a waste of time and money to search their
25 electronic devices, that argument is not made in this and you

1 haven't articulated that yet. I'm articulating it for you,
2 because it seems like maybe what you're trying to say, but
3 haven't said.

4 You are going for the argument that, if we have to
5 do it, they have to do it, which I find a wholly unpersuasive
6 argument.

7 So with respect to that argument, that's a
8 potentially reasonable argument. What I would say to you all
9 about the physical, mental, and emotional discovery, is it
10 depends on what the request is.

11 In other words, I don't think -- on the line you're
12 drawing, no. I reject that. I'm not saying that you, (a),
13 get free range on all of the electronic devices. The first
14 question is, what are the discovery requests? I imagine
15 there's going to be some disputes about the scope of
16 discovery with respect to that, and you need to either
17 resolve that among yourselves or narrow it and present what
18 there is to me.

19 Once there's a question that -- once the scope of
20 discovery of documents, which is what we're talking about, is
21 resolved in some fashion, then you might be able to then
22 actually have a principled, lawyerly argument that there's no
23 reason to think that there's discovery that's within the
24 scope of what they're seeking on their devices. But you've
25 already conceded to me, essentially, for example, Mr. Joffe,

1 that your position isn't right, because if your client has --
2 receives bills from their therapist electronically, and
3 therefore, the bills would be on their phone, you've already
4 conceded to me those bill are discoverable, probably, and
5 that you'd probably be willing to produce them. So you'd
6 have to get them off the phone.

7 So it's not about like -- the question is what's
8 the scope of what they're looking for. So you all need to
9 figure out -- and one thing that I want to be careful about,
10 just because I'm saying you can do this, doesn't mean now --
11 which I don't think you understand it this way, but if you
12 do, Mr. Callaghan --

13 MR. CALLAGHAN: Callaghan, Your Honor.

14 THE COURT: Callaghan, I'm sorry.

15 MR. CALLAGHAN: *Dirty Harry*.

16 THE COURT: Oh, there you go. That will help me.
17 *Dirty Harry*. Okay.

18 Is that how you introduce yourself to opposing
19 counsel?

20 MR. CALLAGHAN: First time I've ever used it in
21 court, Your Honor.

22 THE COURT: I see.

23 So it doesn't mean you get free range on
24 everything. Just because they put it in play, it doesn't
25 mean that everything about anything is fair game, and it

1 doesn't mean you get to look at everything on their iPhone.
2 You know, that's a totally different question. All I'm
3 saying is the line -- like in this day and age --

4 And how old are your clients, the ones who have
5 these claims?

6 MR. JOFFE: My clients?

7 THE COURT: The ones who have the claims for --

8 MR. JOFFE: 45 and -- Alex Styller is 45, Jade is
9 younger.

10 MR. CALLAGHAN: At the end of it, the plaintiffs,
11 Your Honor, who are alleging these damages are in their 20s,
12 30s. They're the detained individuals.

13 MR. JOFFE: Oh, the three individuals detained?
14 Yeah, they're younger. Alex Styller is 45 or something --

15 THE COURT: Right. Do you want to take a risk --
16 take a stab. Take like a bold guess. Do you think that
17 people in their 20s and 30s have more of their lives recorded
18 electronically than you, who I am guessing is over 25?

19 MR. JOFFE: I am, I am, Your Honor.

20 THE COURT: All right. Or less than you recorded
21 electronically about their life?

22 MR. JOHNSTON: I would think, yes. They use more
23 of course.

24 THE COURT: Right. It's conceivable that they have
25 no paper, whatsoever, and everything they do is on their

1 phone, potentially. We don't know.

2 So that's why I mean, like the phones are
3 available. Whether you actually get to search them, what the
4 parameters of your discovery requests are, what the scope is,
5 whether it's burdensome, given what likely would be there,
6 and what the discovery requests, those are questions that are
7 fair game to disagree about. But other than that, I think my
8 position is clear on that issue.

9 All right. So that takes me through the first
10 part.

11 Next, we're under relevant time frame. And I'm not
12 quite clear what the dispute is there. What do you want for
13 the plaintiffs?

14 MR. CALLAGHAN: Your Honor, the position that we
15 took is -- the position that we take is the individual
16 plaintiffs, after they were arrested, they were ultimately
17 released in the middle of 2013.

18 THE COURT: Yup.

19 MR. CALLAGHAN: And to the extent that there was
20 some large conspiracy, or whatever the theory is, that kept
21 them in prison, that horse had bolted when they were
22 released. Thereafter, in the middle of 2014, they were given
23 their equipment back. They were given an apology by the
24 prosecutor, they were told that they would not be prosecuted,
25 that they could go forward with their lives. To me, the

1 horse has definitely bolted at that stage. The only thing
2 that's alleged in the second amended complaint to happen
3 after that is that they got their no criminal prosecution, no
4 criminal record letters from the authorities.

5 THE COURT: So let me ask you, do you both agree on
6 the start date?

7 MR. CALLAGHAN: The start date, we believe, should
8 be around 2010. I'm not sure there's any disagreement on
9 that.

10 THE COURT: All right. So both of you agree that
11 the scope of discovery begins on whatever that date is
12 in 2010.

13 MR. CALLAGHAN: Right.

14 THE COURT: You say it ends either when they're
15 released, or a year later when they are given the apology and
16 the computers were returned.

17 MR. CALLAGHAN: We go even farther, Your Honor. We
18 say at the end of December of 2014. That gives you
19 retrospect, that gives you whatever it is you'd be looking
20 for from the defense side. That will give us what we're
21 looking for from the corporate plaintiffs' side. Because the
22 only thing that happened thereafter, happened in China by the
23 authorities.

24 THE COURT: What happened after the -- what do you
25 mean?

1 MR. CALLAGHAN: They got the no criminal records
2 letters.

3 THE COURT: When did that happen?

4 MR. CALLAGHAN: December 15th and May 16th. That
5 has nothing to do with -- there's nothing alleged that we had
6 anything to do with that. In fact, we were doing everything
7 we could, apparently, to stymy that, according to the
8 allegations -- that's not an admission.

9 Your Honor, we're saying December of 2014 is enough
10 for the corporate parties. The reason we want to carry it on
11 for the individual plaintiffs who have mental, physical, and
12 emotional damages --

13 THE COURT: That's just the three detained
14 individuals and their family members who claimed their loss
15 of consortium?

16 MR. CALLAGHAN: And Mr. Styller. Mr. Styller has
17 suffered a lot of anguish, as well, apparently as a result of
18 being aware that his people were arrested. He's claiming a
19 million dollars in damages for emotional, physical, and
20 trauma-related effects.

21 THE COURT: So you want to have two end dates; one
22 end date of December of 2014 for everybody, except with
23 respect -- it's really for everybody and everything, except
24 for the individual plaintiffs with respect to discovery about
25 mental and emotional health and physical damage claims.

1 And as to that damage discovery, you want it to go
2 until when?

3 MR. CALLAGHAN: Up to the present day, Your Honor,
4 because it's allegedly ongoing.

5 THE COURT: Right. All right. So -- and what's
6 your position on the end dates? How does it differ from his
7 position?

8 MR. JOFFE: Well, Your Honor, our position is that
9 the -- the coverup continued until the filing of the lawsuit.
10 We filed the lawsuit in December of 2015. We think the
11 cutoff date should be December of 2015. They were cited
12 respondents with the defendants --

13 THE COURT: So he wants December 14th, you want
14 December --

15 MR. JOFFE: December 9, 2015, is our proposed
16 cutoff day, which is the filing of the first complaint in the
17 state court. The reason that we would like to have that date
18 as the cutoff is --

19 THE COURT: Why wouldn't you -- that complaint
20 doesn't allege a coverup.

21 MR. JOFFE: That does not.

22 THE COURT: That does not. So why would you want
23 to wait until you filed the complaint that alleged the
24 coverup? Why did -- that complaint alleged no coverup,
25 correct?

1 MR. JOFFE: The original state law complaint,
2 correct, Your Honor.

3 THE COURT: And so why did a lawsuit that alleged
4 no coverup, why did it end the coverup?

5 MR. JOFFE: Well, it didn't -- well, it was already
6 a lawsuit. We were already in litigation. And if I believe
7 correctly --

8 THE COURT: You're dealing with people who threw
9 your clients, essentially, in jail is your theory. Why would
10 the lawsuit have stopped them? Or is it just a practical end
11 date?

12 MR. JOFFE: It is a practical end date.

13 And Your Honor, one of the practical consideration
14 in discovery in general, I think, is relevant under the rules
15 is, you know, I -- again, I'm quoting proportionality, but it
16 also accounts for the relative resources of the parties. And
17 one of the concerns that we have is that the discovery for
18 us, for the parties who are obviously not in the same
19 position as the defendants, is that it becomes burdensome and
20 incremental with every additional --

21 THE COURT: But you want more, he wants less.

22 MR. JOFFE: No, he wants more. He wants the
23 present.

24 THE COURT: No, no, no. He wants all discovery for
25 all things to end in December of 2014, with one exception.

1 The one exception is just as to his discovery about the
2 individual defendants, and just as to those individual
3 defendants as they're claimed for personal damage of
4 physical, mental, and emotional health. He wants that
5 discovery to continue to the present, but all other discovery
6 to be shorter, ending in -- a year before you. That's his
7 only exception to that year.

8 So in other words, his discovery, all the -- his
9 discovery, all the discovery from your corporate client, all
10 the discovery about the merits of the claims on both sides,
11 liability, would be through December 2014. The difference
12 would be, since the claims for damages are ongoing, he can
13 take -- when he asks your client the question, "Well, how did
14 you suffer in 2016, from mental and emotional health," you
15 wouldn't be able to say, "Irrelevant. 2016." You would --
16 he would be able to ask that. But if he said, "What happened
17 in 2016 to support your claims of liability," you could say
18 "irrelevant," and he would have to agree that it was.

19 MR. JOFFE: Yes, Your Honor. But I think what we
20 are discussing here is the practical, for
21 electronic information only. It's not the whole scope of
22 discovery when it should be --

23 THE COURT: Well, is your client going to claim
24 that they suffered any harm or want any damages for things
25 that happened to them after December 9, 2015? In other

1 words, are your clients claiming that they suffered any
2 compensable mental, emotional, or physical damages, after the
3 filings of the date that the state law claim was filed?

4 MR. JOFFE: No. The actions were taken and --
5 before the --

6 THE COURT: No, we're not talking about the
7 actions. That's liability. I'm talking about damage. Are
8 they claiming any compensable damage arising or incurred by
9 them after December 9, 2015?

10 MR. JOFFE: I don't believe they do. You know,
11 they suffered emotional damages as a --

12 THE COURT: Did you sign the complaint?

13 MR. JOFFE: I did sign the complaint, yes.

14 THE COURT: Do you recall what the complaint says?
15 You didn't -- to December 9th, there were no such claims made
16 on December 9th.

17 MR. JOFFE: No, Your Honor.

18 THE COURT: Just to be clear, the reason that I'm
19 asking carefully -- this is a serious question. Because if
20 you are answering the way you're answering, you're waiving
21 things, and I will then possibly cut off their discovery, but
22 you will then have given up any claim for damages forever
23 after, after that date. And so I want to be clear. I'm not
24 trying to trick you.

25 MR. JOFFE: I don't want to make that concession

1 without clearly reviewing what's in the complaint.

2 THE COURT: Right. That's why I'm asking. So let
3 me explain what I'm asking you.

4 Mr. McGuire, do you understand what I'm driving at?

5 MR. MCGUIRE: I think I do, Your Honor.

6 THE COURT: Okay. So let me explain it to both of
7 you. You think about it, but I want to -- he -- the way I
8 understand your claims, the claims that I'm talking about now
9 are claims for which you seek damages of personal -- of
10 physical, mental, and emotional damages. I understand those
11 to be claimed that they suffered harm, that the harm is
12 ongoing, and that some of the damage from that harm, they've
13 incurred on an ongoing basis right up to at least the day the
14 complaint that alleges those claims was filed, if not to
15 today. And the nature of those claims are --

16 This is not like someone who says: I broke my arm
17 in 2010, I was in pain for three weeks, I was in recovery for
18 six months. Nine months later, my arm was as good as new,
19 all the damages were over and that closed the window of time.

20 These are damages of psychological nature that are
21 ongoing in some way. That's how I understand them.

22 Do I misunderstand them? Or do you think that's
23 fair?

24 MR. JOFFE: No, it's fair understanding, Your
25 Honor.

1 THE COURT: Right. Do you agree, Mr. McGuire?

2 MR. MCGUIRE: Yes, Your Honor.

3 THE COURT: All right. That would ordinarily mean
4 that your clients are seeking dollars for what happened to
5 them after December 9, 2015, when the state law complaint was
6 filed. Would you agree with me?

7 MR. JOFFE: Yes, Your Honor.

8 THE COURT: That would ordinarily mean that they're
9 entitled to take discovery about things, the harm that your
10 client suffered after December 9, 2015. Would you agree with
11 me that on that?

12 MR. JOFFE: Yes, Your Honor.

13 THE COURT: All right. So if that's the case, if
14 you -- then how -- why aren't they entitled, as to that
15 narrow topic, to take discovery about things that happened
16 after December 9, 2015, on that aspect?

17 MR. JOFFE: Well, no, they're not not entitled.
18 They are entitled to take discovery on that aspect, Your
19 Honor.

20 THE COURT: Right. That's not what you said
21 before.

22 MR. JOFFE: My objection to the time limit for
23 electronic -- I do get that, not as a discovery schedule or
24 document request, this is a practical for electronic
25 recoverable information.

1 THE COURT: Right. But for electronic recoverable
2 information, what he's saying is there would be two dates.
3 In other words, even you are saying now that there are two
4 dates. In other words, with all due respect, you need to
5 figure out what your position is, because I think you're
6 taking a sensible position now. The reason I was probing you
7 before was because I didn't think that was the position.

8 I think that your clients would have been very
9 angry with you if you had taken the other position, and you
10 would be coming back to me with either a change or you would
11 have had all sorts of problems. So you are taking, unless
12 I'm missing something --

13 Mr. McGuire, am I missing anything? You have a
14 notice of appearance in this case. That the plaintiffs'
15 position is there should be two end dates to discovery. One
16 date, all merits discovery -- all discovery for everything
17 should end on December 9, 2015, except that discovery about
18 the damage claims of the individual plaintiffs about
19 physical, mental, or emotional health runs through the
20 present, and both defendants can take discovery on that and
21 you're claiming losses through the present. You can claim
22 losses.

23 MR. JOFFE: Your Honor, I agree with that position.
24 I think that's halfway between what we proposed and what they
25 proposed.

1 THE COURT: Do you agree?

2 MR. MCGUIRE: I agree with that position, Your
3 Honor.

4 THE COURT: All right. That's the position of the
5 plaintiffs.

6 MR. MCGUIRE: I believe it is.

7 MR. JOFFE: So the stop date will be January 1,
8 2010, for everything. The cutoff for business related
9 communications will be December 9, 2015.

10 THE COURT: No, that's not what I said. All I've
11 been spending the last 20 minutes trying to figure out,
12 Mr. Joffe, is what your position is. Okay. What I do is I
13 decide between the two of you, but I can't decide until I
14 know what your position is. Now I know what your position
15 is, which, with all due respect, has changed in the last
16 twenty minutes. You took the opposite position five minutes
17 ago.

18 Do you understand that?

19 MR. JOFFE: Yes, Your Honor.

20 THE COURT: Okay. Why did you do that?

21 MR. JOFFE: Well, maybe I wasn't sure about the
22 specific date.

23 THE COURT: This is not a complicated issue, I
24 don't think. I mean, you're an experienced lawyer.

25 MR. JOFFE: I know, Your Honor. But it means that

1 my clients will have to spend considerable amount of time and
2 money privileged logging everything that happened in this
3 litigation. Because the majority of this -- that's what I
4 look at it from a practical point.

5 THE COURT: Right. You have a choice, right?
6 That's the choice I was asking you. But you didn't want to
7 take that choice, unless you want to change again, which is
8 fine. But the choice is, you could decide:

9 You know what, Judge, we don't really think we're
10 going to get a lot of money for what happened between
11 December 9, 2015, and the present. And it's going to be
12 really burdensome, because there's going to be a lot of
13 communications that we're going to have to log and be
14 privileged. And there will be all sorts of problems in the
15 depositions, and it's not worth it. So we're prepared to
16 waive, give up forever after, the entire universe for all my
17 clients and their heirs and their descendents and gone and
18 extinguished for any of the damage that they might have had
19 after December 9th. We'll take everything up to
20 December 9th, but we're not going to sit here and ask for
21 more.

22 I'm not saying you have to do that. I'm fine with
23 the discovery up to the present. But you can't have it both
24 ways. You can't say they can't get discovery after
25 December 9th, but you want the damages after December 9th.

1 That's all. And so --

2 MR. JOFFE: I understand, Your Honor.

3 THE COURT: So I understand your position is
4 there's the two dates. So my question, then, is this: You
5 want -- what happened between -- you want, Mr. Callaghan, you
6 want between -- you want to cut off -- forgetting about the
7 damage discovery that we've now figured out, you want to cut
8 off the other discovery on December of 2014, instead of
9 December 2015.

10 MR. CALLAGHAN: That's correct, Your Honor.

11 THE COURT: So why should I cut off the merits
12 discovery, if you will, on liability, on December 2014,
13 rather than the date of the complaint, of the first complaint
14 December 2015?

15 MR. CALLAGHAN: Because Your Honor, if you look at
16 the second amended complaint, there is not one allegation of
17 anything that occurred after August and September of 2014.
18 In fact, there's an allegation in the second amended
19 complaint that after August of 2014, the plaintiffs regarded,
20 quote, "regarded this matter as closed." They saw that there
21 was a parting of the ways, there was no resolution, and the
22 issues were as focused as they were ever going to be.

23 THE COURT: What paragraph?

24 MR. CALLAGHAN: What paragraph is that?

25 It is the second amended complaint, Your Honor.

1 THE COURT: Yes.

2 MR. CALLAGHAN: Paragraph 221. I'm sorry, I beg
3 your pardon, Your Honor. It was the defendants'.

4 MR. JOFFE: It was the defendants'.

5 MR. CALLAGHAN: I misspoke. I apologize.

6 THE COURT: What is it? All right.

7 MR. CALLAGHAN: It was that they allege that the
8 defendants saw the matter as closed. And there's nothing --
9 there's no date alleged after that, other than, Your Honor,
10 we mentioned the no criminal record allegation. And there is
11 also a reference to a date in --

12 THE COURT: So with -- the second amended complaint
13 alleges, is that the defendants thought the matter was closed
14 as of August 2014.

15 MR. CALLAGHAN: Right.

16 THE COURT: That there's no conduct engaged in by
17 the defendants alleged in the second amended complaint, after
18 August of 2014; that the only conduct of anybody described in
19 the second amended complaint, after August of 2014, is that,
20 at some point in the summer of 2015, there is alleged that
21 the Chinese authorities returned the computers -- no, they
22 had already returned the computers.

23 MR. CALLAGHAN: They had returned them in
24 September, Your Honor, of 2014. So -- and they said to the
25 individuals: You're okay, we're not going to prosecute you.

1 Later on, unilaterally by the Chinese authorities,
2 there was an issuance of a no criminal record letter to the
3 plaintiffs, but that had nothing to do with --

4 THE COURT: So what you say is everything was all
5 said and done by September/October, so you pick December as a
6 reasonable end date that's more --

7 The only thing in the complaint that's after that,
8 putting aside the harm that -- the ongoing nature of the
9 harm, is a letter of exoneration or apology that's in the
10 summer of 2015. And what -- do you have any reason to
11 believe that anything you or your clients did prompted that,
12 or are you aware of anything that your clients did between
13 September -- between when they were alleged to have regarded
14 as closed in December of 2015, other than possibly settlement
15 discussions?

16 MR. CALLAGHAN: There were no settlement
17 discussions after September of 2014, either, Your Honor, to
18 my knowledge.

19 THE COURT: I see. So you're not aware of anything
20 by your clients that might have led to the prompting?

21 MR. CALLAGHAN: Absolutely not, Your Honor. We
22 were surprised that it happened when it was alleged. We were
23 obviously delighted that it happened. We didn't even know
24 that the equipment had been returned, because you'll recall
25 when we made our motions in the first instance here, that was

1 a matter nobody knew.

2 THE COURT: So Mr. Joffe, other than the filing of
3 the complaint in December of 2015, what makes the period
4 between December 2014 and December 2015 relevant to the
5 merits?

6 MR. JOFFE: Well, several things, Your Honor.
7 First of all, two weeks or two-and-a-half weeks after we
8 filed the complaint, the first Chinese individual plaintiffs
9 received a letter from the police in December of 2015 -- on
10 December 24th, received a letter exonerating him. And what
11 we allege in our complaint is that there was a coverup.

12 THE COURT: Well, but that's outside the timeline
13 that you propose.

14 MR. JOFFE: Well, no. We allege there was a
15 coverup in this, continuing until at least the filing of the
16 complaint.

17 THE COURT: But what conduct in the second -- first
18 we're going to divide this.

19 In the second amended complaint, what conduct or
20 what events do you allege happened after December 2014 and
21 before the cutoff date you propose for December 2015? One is
22 you say there was an exoneration letter after your cutoff
23 date that was proposed.

24 MR. JOFFE: Yes.

25 THE COURT: So that isn't really very persuasive

1 for why I should pick your cutoff date, but it's maybe
2 persuasive for why I should come up with a cutoff date later
3 than the date you came up. But it's not a very good argument
4 for your cutoff date, because your cutoff date wouldn't reach
5 that, but -- because it happened afterwards.

6 Is what you're telling me.

7 MR. JOFFE: Well, until, at least, August or
8 September of 2014.

9 THE COURT: Forget that, because their cutoff
10 date -- what I'm deciding between is December 2014, what they
11 propose, is -- so anything that happened in August of 2014
12 would be the topic of discovery.

13 MR. JOFFE: Yes.

14 THE COURT: So what is there between December of
15 2014 that happened that suggests that I should pick
16 December 2015 as the cutoff date, besides the filing of the
17 complaint. I get that. That's one fact.

18 MR. JOFFE: Yes. The filing of the complaint would
19 then -- prompted the Chinese police letter. Our substance of
20 the complaint is that defendants withheld exonerating
21 information from plaintiffs throughout the period, and
22 despite repeated requests by plaintiffs for --

23 THE COURT: What allegations in the second amended
24 complaint, in short and plain statement of your complaint,
25 what allegations describe conduct after December 2014?

1 MR. JOFFE: After December of 2014?

2 THE COURT: Correct.

3 MR. JOFFE: They've continued to withhold that
4 information, Your Honor.

5 THE COURT: Where does it say that?

6 MR. JOFFE: The whole complaint alleges that
7 they --

8 THE COURT: Mr. Joffe -- okay --

9 MR. JOFFE: The fact that we asked -- the last
10 response was in August or September 2014, telling them, "Give
11 us that information," and they refused. And they didn't
12 provide that information until the filing of the complaint,
13 which means, in their possession, there could be relevant
14 documents.

15 THE COURT: Who?

16 MR. JOFFE: HP. Why they're not reviewing that
17 information.

18 THE COURT: What information?

19 MR. JOFFE: Your Honor, through 2013 and 2014, our
20 complaint cites a number of letters of respondents written to
21 the defendants with one request, "Please produce the
22 information that is needed to exonerate our individual
23 Chinese plaintiffs," and they didn't. They didn't do it in
24 August '14, they didn't do it in September '14, and they
25 continued not to do it until --

1 THE COURT: So are you contending that after
2 December of 2014, your client wrote another letter to --

3 MR. JOFFE: No, they didn't write another letter to
4 them.

5 THE COURT: And are you contending that they took
6 affirmative action after December of 2014?

7 MR. JOFFE: I just -- based on the fact that they
8 did not release that information, I assume that -- what's
9 action they did before, up to August '14, where they withheld
10 it. They continued --

11 THE COURT: Why do we need to take discovery about
12 that one year? In other words, you wrote to them earlier,
13 as -- you allege that you wrote to them earlier. They
14 responded or didn't respond. They're not -- are you planning
15 to come back --

16 MR. JOFFE: They responded, Your Honor.

17 THE COURT: Are you planning to come back,
18 Mr. Callaghan, and say that after December of 2014, but prior
19 to the filing of the complaint on December 9th, HP did
20 anything with respect to this?

21 MR. CALLAGHAN: That is not our intention, Your
22 Honor.

23 THE COURT: So you're not going to be coming and
24 saying: Well we actually wrote to the Chinese authorities at
25 some point during that one year.

1 MR. CALLAGHAN: That would be --

2 THE COURT: In other words, it wouldn't be fair to
3 then --

4 MR. JOFFE: But we don't know that, Your Honor.

5 THE COURT: Well, you've alleged that. You alleged
6 that they didn't do anything.

7 MR. JOFFE: No, they didn't do it with respect to
8 us. They didn't respond to our request. I don't know what
9 they did with the police.

10 THE COURT: You have a good faith basis to believe
11 that they did anything with the police between December 2014
12 and December 2015?

13 MR. JOFFE: I have good faith to believe that they
14 may not have done something, and there will be internal
15 documents, or could be, discussing why they would not do it.

16 THE COURT: Do you have a good faith basis to
17 believe that they had a discussion between December 2014 and
18 December 2015 about this?

19 MR. JOFFE: Well, Your Honor, my clients were
20 still, at that time, in legal jeopardy in China and
21 nothing --

22 THE COURT: Well, that has nothing to do with your
23 good faith belief. The question is --

24 MR. JOFFE: I've asked -- well, plaintiffs asked
25 defendants to produce the information for them that will help

1 them with the police authorities. They've asked for many --

2 THE COURT: You're missing the point, Mr. Joffe.
3 This is a very simple question, okay, with a very simple set
4 of answers, one way or the other --

5 Are you having trouble, Mr. McGuire?

6 MR. MCGUIRE: No.

7 THE COURT: Maybe you can talk to each other.

8 But my question is this, it's either a very simple
9 question, where I'm missing something -- and if I'm missing
10 something, then my apologies; and then one of you needs to
11 explain it to me.

12 The question is simply: They've made an argument
13 why discovery should end on December '14. They say it should
14 end on December 2014, because your complaint alleges nothing
15 they did after that time period. Everything you allege that
16 they did or didn't do happened before. There's the
17 allegation that they never did anything after that.

18 And they said: We're not going to be coming in, in
19 this trial or in discovery in this case, with evidence that
20 we did something on -- with relating to any of the claims
21 between December 2014 and December 2015. Like whatever we
22 did or didn't -- whatever we did, we did before, and you're
23 not going to hear from us that we did something after that.

24 Okay. So I'm asking what facts you want
25 December 2015. I'm just trying to decide whether discovery

1 should end in 2014 or 2015.

2 So the question would be what happened in that time
3 period that might make discovery useful? So one thing would
4 be that they are going to save something that you would
5 fairly be entitled to take discovery on. They said they're
6 not. So they're stuck with that now. They -- might be that
7 you have alleged that they did something that you want to
8 take discovery on. You haven't -- they say you haven't
9 alleged anything during that time period; I am not hearing
10 you tell me anything in the complaint that you allege that
11 they did do. One thing might be is that they -- that you
12 have a good faith basis to believe that they were talking
13 about this during the time period, and even though they
14 didn't do anything, there would be internal discussions about
15 it.

16 I didn't hear Mr. Joffe say he has a good faith
17 belief in that. It would be a difficult thing, in light of
18 paragraph 221, to believe that you had a good faith belief in
19 it, because paragraph 221 alleges that -- your good faith
20 belief that they regarded it as closed as of August of 2014.
21 It doesn't mean it was closed, but the way I interpret that
22 is you think they were all done with it then. Maybe they
23 shouldn't have been all done with it.

24 MR. JOFFE: Your Honor, in paragraph 220, right
25 before, I quote their statement, their letter that they

1 consider this matter closed. That's paragraph 221, just say:
2 So the defendants regarded this matter closed. But that's
3 all it does. It's not -- it doesn't carry the same weight
4 that Mr. Callaghan misquoted it.

5 THE COURT: Fair enough. So the question is: Do
6 you have a good faith belief that they were discussing it
7 then? Is that the reason? In other words, what is the
8 reason that you want to take discovery during that year?

9 MR. JOFFE: That's the only reason that I want to
10 take discovery, because that -- you know, there is nothing in
11 the complaint alleged that they --

12 THE COURT: You concede that.

13 MR. JOFFE: I concede that, that there's no
14 affirmative act since --

15 THE COURT: So the reason to take discovery during
16 that time period is to see whether they were discussing --
17 continuing to discuss the matter. Because if they were, that
18 might be relevant to the claims.

19 MR. JOFFE: Correct, Your Honor. And the thrust of
20 the complaint is that HP was withholding, for all these
21 years, until December 24, 2015, when the first individual
22 Chinese plaintiffs received the Chinese police letter of no
23 criminal record. Until that very time, which coincided with
24 the filing of the state action, HP was withholding relevant
25 exonerating information. Until August of 2014, they were

1 withholding it with affirmative --

2 THE COURT: This is just a deadline for electronic
3 discovery, right?

4 MR. JOFFE: Yes, that's all we're discussing.

5 THE COURT: December 2014. I think that the
6 longer -- given what I've heard and the back and forth, I
7 think that the further time period would be just
8 disproportionate and unnecessary and not worth whatever might
9 be discovered. So December 2014 for electronic discovery,
10 excepting with respect to the individual plaintiffs' claims
11 of physical, mental, and emotional health, which runs to the
12 present.

13 Okay. I think that takes care of (c). What I --
14 the next disagreement I saw was on ECF page 19, which is --
15 comes after the custodians. Plaintiffs' position and
16 defendants' position, it seems to be a dispute about Schultz,
17 Whitman, and McCarthy. I'll hear you first just about
18 McCarthy.

19 MR. CALLAGHAN: Thank you, Your Honor.

20 Your Honor, Mr. McCarthy's only alleged involvement
21 here in the second amended complaint was in his capacity as
22 an outside attorney when he was with Gibbons. He was
23 communicating back and forth with Mr. Riordan and the --

24 THE COURT: Who is Riordan again?

25 MR. CALLAGHAN: Mr. Riordan was the predecessor

1 counsel to Mr. Joffe. He was the one who filed the initial
2 complaint in December of 2015, but he was active on behalf of
3 ICT during this entire process.

4 THE COURT: Yes.

5 MR. CALLAGHAN: He was dealing with David Gill at
6 HPFS India, and ultimately he -- Mr. Riordan reached out to
7 Stiller, who we can address in a moment. And the allegation
8 is that after Stiller, the general counsel of HP, became
9 aware of all of this, McCarthy was hired. So McCarthy's --
10 allegations against McCarthy's here were in his
11 communications with Riordan. You already found that the
12 absolute litigation privilege in Massachusetts protects
13 against a claim issuing against McCarthy for those
14 communications.

15 There's another period of time that would be
16 relevant to McCarthy, Your Honor, and it needs -- it merits
17 some clarification. McCarthy was the general counsel of
18 Hewlett-Packard Financial Services up until he decided to
19 retire in June of 2012. That retirement was announced in
20 July of 2012. He transitioned his responsibility through
21 August/September of 2012. His role as general counsel
22 effectively was taken over by another attorney at that stage.
23 He remained with the company until the end of February of
24 2013. He was on gardening leave after Christmas of 2012, and
25 he joined Gibbons and --

1 THE COURT: Remind me when the three individual
2 plaintiffs were arrested.

3 MR. CALLAGHAN: They were arrested in December of
4 2012, after McCarthy's role had effectively ended. And HPFS
5 India was first apprised of that arrest at the end of January
6 of 2013.

7 THE COURT: All right.

8 MR. CALLAGHAN: And McCarthy is on gardening leave,
9 he tells us, during that period. That's our good faith
10 understanding, Your Honor.

11 THE COURT: All right. And then after that, later,
12 he goes to --

13 MR. CALLAGHAN: He goes to Gibbons when he retires.
14 He comes to Gibbons as counsel on -- in March. And he's at
15 Gibbons for a period of time before he gets involved in any
16 of this in the summer, I think, of July/August of 2013.
17 That's when he starts corresponding with Riordan.

18 THE COURT: And so is your -- is the question to
19 him being a custodian, custodian with respect to Gibson, or
20 as custodian with respect to what he had when he was in his
21 general counsel role?

22 MR. CALLAGHAN: It's not clear what the plaintiffs
23 are looking for, Your Honor. But we believe you've already
24 ruled that anything he did with Gibbons would be protected by
25 the absolute litigation purpose --

1 THE COURT: So are you objecting to -- when you say
2 "custodian," the stuff he had at Gibson, or the stuff he had
3 at HPFS?

4 MR. CALLAGHAN: HPFS, Your Honor. Because he
5 didn't have anything is what he tells us.

6 THE COURT: I'm sorry?

7 MR. CALLAGHAN: He was unaware of this entire
8 sequence of events during his --

9 THE COURT: So you're saying, as to the time he's
10 at HPFS, it's just a waste, because he doesn't have anything.

11 MR. CALLAGHAN: That's our position, Your Honor.

12 THE COURT: And so it would just be a --
13 burdensome. And as to Gibson, your view is he shouldn't be a
14 custodian, period.

15 MR. CALLAGHAN: Absolutely, Your Honor.

16 THE COURT: I see.

17 What's your position as to him?

18 MR. JOFFE: Yes, Your Honor. Mr. McCarthy, as
19 Mr. Callaghan just explained, was a general counsel for
20 defendant HPFS, which is our main defendant, until at least
21 end of February of 2013, at the time -- that time period
22 covers both the 2011 regional sale of the equipment to ICT
23 and the period of arrest.

24 The complaint alleges that Mr. McCarthy was general
25 counsel while Mr. David Gill was engaged in communications

1 with respect to the arrests. The complaint alleges that
2 Mr. McCarthy was actually -- that David Gill was reporting
3 everything about the incident to Mr. McCarthy, who was his
4 direct boss. We're not looking for Gibbons files or
5 correspondence. We're strictly asking him, as a custodian of
6 HPFS, to be --

7 THE COURT: So you're not seeking anything with
8 respect to him, with respect to his time at the outside law
9 firm?

10 MR. JOFFE: No. We're looking for him as a
11 custodian of HPFS, while he was general counsel of HPFS
12 during the relevant period of the events, and his involvement
13 is well alleged in the complaint. They should have -- HPFS
14 should have had his electronic data after he left in 2013.
15 They should probably have some kind of backup or optical
16 storage devices, or whatever they do with a former senior
17 executive employees when they leave the company.

18 The same applies with Meg Whitman, who left HP --

19 THE COURT: You really think she's the same as
20 McCarthy?

21 MR. JOFFE: She is also --

22 THE COURT: But answer my question.

23 MR. JOFFE: Yes, McCarthy was a general counsel
24 of --

25 THE COURT: No. Is she the same -- you just said

1 she's just like that. Is she the same as McCarthy?

2 MR. JOFFE: She is --

3 THE COURT: That's a yes or no question, or you
4 can't answer it with a yes or no.

5 MR. JOFFE: She is the same in terms of she's a
6 former employee of HPFS -- or HP, I'm sorry, one of the
7 defendants, and she should have her electronic data
8 available.

9 THE COURT: Are there any former employees who
10 shouldn't have their electronic data available?

11 MR. JOFFE: No. The issue is that they raised the
12 objection that McCarthy and Schultz and Whitman are senior
13 employees, senior executives of the company.

14 THE COURT: Well, that's actually not the objection
15 he raised with respect -- did you read what he said here?
16 The words actually matter, Mr. Joffe.

17 MR. JOFFE: Yes, Your Honor, I did.

18 THE COURT: "McCarthy had no involvement with the
19 facts underlying this case, while employed by HP and" --

20 MR. JOFFE: But that's not what we allege. We
21 allege that he did have --

22 THE COURT: But that is his argument. So his
23 argument is -- and I'm not saying it's right, but his
24 argument is not -- it's not right, it's not truthful to say
25 that his argument is that he's a senior employee and,

1 therefore, shouldn't have his electronic discovery. That's
2 his argument as to other people, but as to this witness, his
3 argument is that the person has no involvement. So to say
4 his argument is that they're too senior, and, therefore,
5 shouldn't be disclosed, is just not true.

6 MR. JOFFE: No, I move on to Schultz and Whitman,
7 but on McCarthy, he was general counsel of HPFS until March
8 of 2013.

9 THE COURT: Right. But did you hear what he said?

10 MR. JOFFE: Well, I hear what he just said, for the
11 first time, and that's an easy answer that nobody has any
12 relevant information. We believe he does. We believe we've
13 alleged sufficiently and reasonably and that reasonable
14 inference from our allegation is that Mr. McCarthy, while at
15 HPFS, would have relevant, responsive --

16 THE COURT: So Mr. Callaghan, I think he's waive
17 this. With respect to Mr. McCarthy at the law firm, he's
18 waived that. He's not --

19 MR. JOFFE: I'm not seeking that.

20 THE COURT: You're fine on that.

21 MR. CALLAGHAN: Yes.

22 THE COURT: So you don't have to produce that as
23 custodian or search that.

24 With respect to him at HPFS, what I understand him
25 to be saying, somewhat inartfully, is that he wants to test.

1 It's fair enough that you say this. He's now abandoned that
2 you're making the senior argument, because you didn't make
3 that argument. But he's now, with respect to the argument
4 you are making -- your essential argument, as I understand
5 it, is that he didn't have any involvement, because he
6 essentially retired; and though he's on the payroll and had
7 the title, he didn't have anything to do with it, so it's a
8 waste of time and money.

9 So he's saying, re-reciting what we already know,
10 which is in the complaint. But really what I think he's
11 saying is that he wants to test that. And he's entitled, I
12 think, to test that. So it may be that he doesn't have
13 anything, and then so be it.

14 And so I think it's much like the issue that we
15 talked about in the beginning. You can -- if you have more
16 information you think that you'll show him and you think that
17 he'll engage with, and if you think you can persuade him, and
18 if you agree that it might lead you to decide, you know what,
19 as to him, there's less time period, or what have you. But
20 if not, I think, during HPFS he was the general counsel, he
21 had the title, and the period that he negotiated -- it sounds
22 like he negotiated, or had a role in negotiating the
23 contract? No, he didn't.

24 MR. CALLAGHAN: Your Honor, since we had prepared
25 this, obviously in anticipation of further conversations, I

1 actually communicated with him. He's no longer with Gibbons,
2 but I communicated with him, and that's where I got the
3 detail about June/July transition, and so on. So we're happy
4 to --

5 THE COURT: So my suggestion is a practical one
6 about this, that you talk to each other about it. If you
7 have a little more information about it, you give it to them.
8 I think in the ordinary universe, it's the kind of thing
9 which the plaintiff is entitled.

10 If you believe it's a waste of time, because you
11 didn't have anything to do with it, explain the basis for
12 that belief to Mr. Joffe. If you persuade Mr. Joffe then --
13 obviously, and you reach an agreement, then you don't have to
14 do it. If you don't persuade Mr. Joffe, because Mr. Joffe
15 says, "I want to test that, or be given the role, or given
16 that he got copied on certain e-mails, I think that he would
17 have useful information, either by way of deposition or
18 documents that I want to take," then I think he's entitled to
19 do it.

20 You could -- I'm not inviting this motion, but
21 you're always free to make a motion and say: Judge, we
22 shouldn't have to do this person. But then I would need a
23 pretty strong factual basis set forth in an affidavit as to
24 why it would be a waste. And what I would suggest is, if you
25 make that motion, you should provide that information, in

1 fairness to Mr. Joffe, first, to see if you agree. And if
2 you don't, then fine. Otherwise, I think, short of that,
3 short of an agreement, or a real basis that's clear to
4 establish that, that it's really a waste and unnecessary, set
5 forth in a motion, to which they get the chance to respond
6 to, that I would then look at both filings. Other than that,
7 you would have to do it.

8 MR. CALLAGHAN: Your Honor, thank you very much.
9 And we're satisfied with the clarification this his time at
10 Gibbons is not the subject of the search. But for fear of
11 inviting the wrath of the Court, in light of your earlier
12 admonition -- and this is not a reciprocity issue, I see in
13 looking at our list of custodians on their part, that we
14 omitted to include their effective general counsel, ICT's
15 effective general counsel, Lester Riordan, who was
16 negotiating on behalf of ICT during this entire period. We
17 would ask that we have a chance to amend to include
18 Mr. Riordan as a custodian on their part.

19 THE COURT: So you can talk about that. I give you
20 leave to talk to each other about that. It's not too late.
21 I don't view it as waived because it's too late. I'm not
22 saying he's an appropriate custodian or not, but you can ask
23 for that and talk to each other about that, and either you
24 reach an agreement or you don't.

25 And with respect to Schultz and Whitman, what is

1 the basis with respect to -- Whitman, I understand, she was
2 the CEO for a time. Schultz was what? Was he the overall?

3 MR. CALLAGHAN: He was the overall general counsel
4 at HP, Your Honor. And the only involvement that he had in
5 this case, to our knowledge, is that Lester Riordan, on
6 behalf of ICT, effective in-house counsel of ICT, or in-house
7 counsel, wrote him a letter saying: We're trying to resolve
8 this issue, we're not getting any traction. Can you help us?

9 Schultz picked up a phone, called Riordan, left him
10 a message saying somebody will get back to you. Thereafter,
11 somebody got back to Riordan, and the matter progressed. And
12 the person that got back to Riordan, I believe in the
13 allegations, is a guy called Stuart Patterson. Stuart
14 Patterson is a target, he's a custodian. Whatever he's going
15 to disclose or whatever we get from him will tell us if
16 Riordan had any further involvement.

17 But Riordan was general counsel --

18 THE COURT: Schultz.

19 MR. CALLAGHAN: Schultz. I beg your pardon.
20 Schultz. Schultz was the general counsel of the corporate
21 parent and --

22 THE COURT: And Whitman's role was she received --
23 she was sent a letter.

24 MR. CALLAGHAN: She was sent a letter, we don't
25 even know if she received it, Your Honor.

1 THE COURT: All right. So why should Schultz
2 and/or -- why are one or both of them subject to electronic
3 discovery, Mr. Joffe?

4 MR. JOFFE: Yes, Your Honor. Well, Schultz did
5 receive a letter, Schultz did get involved in the case.
6 Schultz assigned one of his -- Stuart Patterson, one of the
7 attorneys, and Schultz communicated, and then Stuart
8 Patterson got involved. He was aware and he was involved in
9 the matter.

10 We also, Mr. Styller wrote a letter to Ms. Whitman
11 at the same time, and Ms. Whitman does not deny receiving
12 that letter. She says she was a busy CEO, but she doesn't
13 deny receiving it. But what we have now in the case is that
14 there is David Gill, who was the assistant general counsel --

15 THE COURT: I don't think she has to deny it in the
16 letter, because she's not a party to the lawsuit.

17 MR. JOFFE: She's not, because --

18 THE COURT: Did she file an affidavit?

19 MR. JOFFE: She didn't file an affidavit.

20 THE COURT: So where did she not deny receiving the
21 letter?

22 MR. JOFFE: In the -- in one of the papers that
23 they filed.

24 THE COURT: What paper?

25 MR. JOFFE: It was a motion to dismiss, I believe.

1 THE COURT: She filed an affidavit into the -- one
2 of the motions to dismiss?

3 MR. JOFFE: No, she didn't. But it was presented
4 in paper, signed by counsel.

5 MR. CALLAGHAN: Your Honor, you recall that in a
6 motion to dismiss, we assume all alleged facts to be true,
7 and we go forward in that capacity. To the extent such a --
8 an inference can be drawn from anything we wrote in our
9 papers on a motion to dismiss, that is not a statement, Your
10 Honor --

11 MR. JOFFE: There is no denial that she received
12 the letter.

13 THE COURT: When would they deny it, Mr. Joffe?

14 MR. JOFFE: They didn't deny receiving the letter.

15 THE COURT: Have you denied beating your wife? I
16 mean, it's not the same. If you have a wife, you don't have
17 to deny beating your wife. Why is she -- what is the
18 significance? When would she have denied it? When would be
19 the time for her to deny it? Explain that to me, Mr. Joffe.

20 MR. JOFFE: Defendants did not deny the fact.

21 THE COURT: No, no, Ms. Whitman. You said
22 Ms. Whitman didn't deny it, right? Did you say that five
23 minutes ago in court? Yes or no? You said that? Did you
24 say Ms. Whitman did not deny it?

25 MR. JOFFE: I meant they, the defendants, Your

1 Honor. She was not the -- she was proposed defendant in
2 the --

3 THE COURT: No, she was a defendant. You sued her.

4 MR. JOFFE: No -- well --

5 THE COURT: You proposed suing her.

6 MR. JOFFE: We proposed, but she was never formally
7 a defendant, Your Honor.

8 THE COURT: So what difference does it make that
9 she didn't deny it? When would she have had the opportunity
10 to deny? When would be a time that her failure to deny it
11 would be meaningful and relevant? Can you identify one as a
12 lawyer?

13 MR. JOFFE: I can identify, and I will be happy to
14 provide reference in the papers filed on behalf of HPFS.

15 THE COURT: Where they didn't deny it?

16 MR. JOFFE: Where they didn't deny that
17 Ms. Whitman --

18 THE COURT: And would you agree that the law says
19 that all of the facts that you alleged in the proposed
20 amended complaint, they have to accept as true and the
21 reasonable inferences drawn therefrom?

22 MR. JOFFE: Yes, Your Honor.

23 THE COURT: And so would you agree that if they had
24 denied it on her behalf, that that denial would not have been
25 something that would have been relevant to my decision?

1 MR. JOFFE: Yes, Your Honor.

2 THE COURT: So why would it matter that she didn't
3 deny it?

4 MR. JOFFE: Well, it matters because our
5 allegations state that she was aware of this situation at the
6 time, in June 2012, when the people were still in jail, that
7 she was aware of it.

8 THE COURT: So that's your allegation, but you
9 didn't say that. You said she didn't deny it. So why does
10 that matter?

11 MR. JOFFE: Because it makes her a relevant
12 custodian for the discovery, Your Honor.

13 THE COURT: Can you explain to me, Mr. McGuire, why
14 it would matter?

15 MR. MCGUIRE: Your Honor, what I heard was, at the
16 beginning of this discussion, I heard Mr. Callaghan say, with
17 regard to the allegation, that a letter had been sent to
18 Ms. Whitman, that we don't know whether she ever received it.

19 THE COURT: Correct.

20 MR. MCGUIRE: I think that was the statement that
21 Mr. Joffe was --

22 THE COURT: Do we know whether she received it?

23 MR. MCGUIRE: I don't know that we do, other than,
24 Your Honor, in the fact that in the ordinary course of letter
25 sent to the CEO of the company through the US Mail,

1 presumably reaches the CEO of the company.

2 THE COURT: Well, presumably reaches the office.

3 MR. MCGUIRE: Presumably reaches the office, and I
4 don't know of any reason to believe --

5 THE COURT: But we don't have it as established
6 fact, for example, whether the address was correct or not.

7 MR. MCGUIRE: That's correct, Your Honor. For
8 purposes of determining whether her ESI file, now dormant,
9 should be searched in connection with the ESI discovery in
10 this case, to determine whether she, upon receiving the
11 letter, if she did, had a reaction to it that included, in
12 communications -- nonprivileged communications within the
13 company about this matter, that might shed light on the
14 company's position at the time, I think it is fair to say
15 that she should be a custodian, and it's nonburdensome to
16 include her in that capacity.

17 THE COURT: So the theory is that she should be a
18 custodian because somebody sent her a letter which was never
19 responded to, as far as we know. As far as we know, for
20 purposes of deciding this.

21 MR. MCGUIRE: Yes.

22 THE COURT: I have before me an allegation that she
23 was sent a letter.

24 MR. MCGUIRE: Correct.

25 THE COURT: And I have a --

1 MR. MCGUIRE: The acknowledgment.

2 THE COURT: And a lengthy amended -- or a detailed
3 amended complaint. Would you agree with me on that?

4 MR. MCGUIRE: Yes.

5 THE COURT: All right. That lays out a lot of --
6 this is not a sparse amended complaint. Would you agree with
7 me on that?

8 MR. MCGUIRE: Agreed.

9 THE COURT: And lays out a lot of the detail, and
10 it does not allege anywhere anything that she ever did.

11 MR. MCGUIRE: Correct.

12 THE COURT: And there's no information it was so
13 far from what little discovery might have already happened,
14 that fills that out to suggest anything else to augment her
15 role in this case.

16 MR. MCGUIRE: Other than the sending of the letter,
17 correct.

18 THE COURT: But that's not augmented, you knew that
19 already.

20 MR. MCGUIRE: Agreed.

21 THE COURT: So why would I -- why should we
22 search -- and will you agree with me that, given her position
23 that you've alleged in the complaint, which seems to be one
24 that she had, that she's likely to have a lot of electronic
25 discovery?

1 MR. MCGUIRE: That she's likely to have a
2 substantial amount of ESI. I agree with that. And I think
3 if the parties need to negotiate a narrower time frame and
4 have a more targeted search of her particular ESI, in order
5 to determine whether she received a letter and responded to
6 it with communications that might be relevant to this
7 dispute, I think that that's something that the parties could
8 achieve. I also think --

9 THE COURT: You have a greater faith than I that
10 it's achievable.

11 MR. MCGUIRE: Well, hope springs eternal.

12 THE COURT: In other words, there's been -- like a
13 lot of time has elapsed, and like that's a pretty obvious
14 discussion, right, Mr. McGuire?

15 MR. MCGUIRE: Agreed.

16 THE COURT: In other words, she's the CEO of a
17 Fortune 500 company, and you've got the thinnest possible
18 thread that she has any conceivable connection to this case.
19 You have no evidence whatsoever that she ever did anything.
20 The most you have is an inference that the letter was sent,
21 was not only received by her office -- a fair inference --
22 but you have possible inference that she read the letter.
23 But we don't even know that, because it's a reasonable
24 inference, given her role, that she might receive a lot of
25 mail, right?

1 MR. MCGUIRE: (Indicating.)

2 THE COURT: You have to say yes or no for the court
3 reporter.

4 MR. MCGUIRE: I'm sorry. Yes, Your Honor, I agree.

5 THE COURT: So that's all you have. So the reason
6 I jump on you for achievable, is what I would have expected
7 achievable, when they responded in this filing I got two-plus
8 weeks ago, where it said she's a senior person and we think
9 it's a waste, you -- did anybody on your side go back and
10 say: Look, we recognize that all we have is this one letter
11 that we sent her. And we have no evidence, whatsoever, in
12 our 94 page, 356 paragraph complaint that she ever read it or
13 did anything. We don't allege that. And so we would be
14 prepared, and we recognize the world, that she might have a
15 lot more, we would be prepared to discuss like maybe we could
16 do something really targeted to see whether it's worth
17 something.

18 That discussion hasn't happened.

19 MR. MCGUIRE: To this point, Your Honor, part of --
20 and again, I think Mr. Joffe alluded to this earlier. The
21 conversations relating to discovery scope -- and I would put
22 this in the category of the things addressed in the
23 deficiency letters is scheduled for 48 hours from today. I'm
24 optimistic that those conversations will be substantially
25 more fruitful than the filings that has taken place to this

1 point.

2 THE COURT: That's good. It would be difficult to
3 imagine them being less fruitful than the silence.

4 MR. MCGUIRE: That's why I'm optimistic.

5 THE COURT: All right. My view would be this: As
6 a general matter, searching Schultz and Whitman's -- all --
7 the entirety of their electronic discovery, which is what I
8 understand the plaintiffs' position to have been, until
9 Mr. McGuire stood up, to be wholly unreasonable on the
10 present record and wholly unsupported. That said, the notion
11 that they might have something, along with what Mr. McGuire
12 has practically suggested, like some targeted look, I leave
13 to all of you to figure out.

14 And you can see she got a letter. Well, I assume
15 she got the letter. And what more than that, what scope of
16 look-see into that, the -- searching every iPhone, every
17 e-mail, every electronic document on her computer, every
18 electronic document she had, with respect to every public
19 filing, every disclosure, that's not only burdensome and
20 frivolous, it's harassing.

21 MR. JOFFE: We're not asking for it, Your Honor.

22 THE COURT: No, you are. That's not true. You
23 asked for everything. You asked to look at all of her
24 electronic discovery subject as to the terms that you
25 proposed. So that's the scope of everything. You haven't

1 asked for the narrowing that Mr. McGuire articulated. You
2 might be planning to ask for it, that's fine, but you haven't
3 articulated that to me in this court proceeding, and you
4 haven't referred to having done it before.

5 Okay. So as to a more reasonable discussion, scope
6 of what she is, and in light of the fact that if you then
7 later learn in discovery that somebody was e-mailing her all
8 the time and she was coming to meetings and participating in
9 a coverup, and popping champagne corks when your clients were
10 in custody, you can obviously get more discovery, in light of
11 what you earned. But you earned what you have in your
12 complaint, and you can take it as far as that reasonably
13 takes you. So you talk about that, and see what you work out
14 in the conference that you have in 48 hours.

15 That is -- no, I have one more. Two more.

16 Oh, there's an issue on page 24. Plaintiffs object
17 to defendants' request to -- for plaintiffs Cheng and Styller
18 to produce all social media posts and entire call logs as
19 disproportionate, and the like, and -- but apparently then
20 there's recited what Mr. Cheng has said in response to an
21 interrogatory, and Styller.

22 So my suggestion on that is that you should talk to
23 each other about that. Given the nature of the age of these
24 plaintiffs, the likelihood that they memorialize many things
25 in social media and that the nature of the claims and the

1 specific information that's advanced here, it seems like it
2 would be some disclosure of that would be reasonable. So a
3 categorical line that they can't look at anything in social
4 media seems unreasonable.

5 Whether the defendants get everything, in every
6 Facebook, every Instagram, every whatever, I'm not saying
7 that. But the notion that they get nothing, when he says
8 that he has difficulty enjoying life, no interest in
9 celebrating holidays, no interest in visiting relatives or
10 friend, among other things, would seem to be reasonable to
11 see whether, on social media, he exhibits that or not.

12 He's one of the people in his 20s, right?

13 MR. CALLAGHAN: Yes, Your Honor.

14 MR. JOFFE: Early 30s, I think.

15 THE COURT: Early 30s. And having a hard time
16 working and communicating with others brings to rise
17 potential discovery regarding communication. It has to be
18 reasonable. You're not entitled to look at everything, just
19 because they put these things in issue, but I think some
20 discovery on that. I'll let you all, in the first instance,
21 work that out.

22 On the last page.

23 MR. CALLAGHAN: Your Honor, to the extent I can
24 interrupt --

25 THE COURT: Yes.

1 MR. CALLAGHAN: -- on the Binghui individual, for
2 the moment, we would rather like to postpone that issue until
3 we get more clarification.

4 THE COURT: Fine. Okay. Do either of you have
5 anything else you want to raise?

6 MR. CALLAGHAN: Yes, Your Honor. I think something
7 that's relevant, as well. We talked earlier about the impact
8 of a potential spoliation motion and what that would do to
9 the remainder of the case or not and that would narrow it
10 down. When we were last here, we were talking about the
11 equipment that had been returned in China.

12 THE COURT: Yeah. You got that equipment, right?

13 MR. CALLAGHAN: We got it.

14 THE COURT: Quickly, right?

15 MR. CALLAGHAN: It came very quickly.

16 THE COURT: Did anyone get arrested at the border
17 in China?

18 MR. CALLAGHAN: Not to our knowledge, Your Honor.

19 THE COURT: Did anybody get arrested at the border
20 of the United States?

21 MR. CALLAGHAN: Not to our knowledge. But Your
22 Honor had issued an order, which I think probably absolved
23 them.

24 MR. JOFFE: Thank you, Your Honor.

25 THE COURT: You're welcome.

1 You don't have any information to suggest anyone
2 got arrested in China or here when that was transferred.

3 MR. JOFFE: Nobody got arrested.

4 THE COURT: Good.

5 MR. CALLAGHAN: They hadn't denied it until now,
6 Your Honor.

7 MR. JOFFE: They had denied it before.

8 MR. CALLAGHAN: The reason that I bring it up, Your
9 Honor, is we did have an opportunity to have some folks, on
10 behalf of us as counsel, take a look at the returned
11 equipment, which was the seized equipment, the subject
12 equipment, and there were two categories of transceiver
13 there. There were XFPs.

14 THE COURT: What exactly are these transceivers?

15 MR. CALLAGHAN: They are little thumb drives, Your
16 Honor, with a latent memory associated with them. And what
17 they do is they are sort of like a catalyst that facilitates
18 the operation of computer equipment.

19 THE COURT: Would they be inside an individual
20 laptop or a computer, personal computer, or would they be
21 more like a network device like on a board as part of a
22 server?

23 MR. CALLAGHAN: I'm not -- I'm a little bit of a
24 luddite, Your Honor, so getting down to that level of --

25 THE COURT: What about *Dirty Harry*?

1 MR. CALLAGHAN: I have a solution that doesn't
2 require discussion.

3 THE COURT: Yes.

4 MR. CALLAGHAN: Our understanding is that they're
5 something like thumb drives in terms of size and shape, and
6 that they allow interconnectivity between larger computer
7 systems or computer networks. There's a latent memory. It's
8 called an EPROM, an Electronically Enabled -- something --
9 ROM.

10 THE COURT: Electronically Programed Random --
11 something -- Memory.

12 MR. CALLAGHAN: Yes. And that that then can speak
13 to H3C equipment, computer equipment. And it allows a back
14 and forth, I believe, between the separate pieces of
15 equipment or the internal network of an H3C system itself.

16 There were two categories of transceiver. One was
17 this XFP, which is a little bit bigger. And there was
18 something like 685 SFPs, 95 XFPs. I can share, under the
19 auspices of 408, because this was done on our behalf as
20 counsel. And I bring this up again, only in the hope of
21 narrowing the case.

22 Would you agree that I can express our inspector's
23 report to us, under the auspices of 408?

24 MR. JOFFE: Sure. Or you can produce it.

25 MR. CALLAGHAN: Well, I'm not as inclined to

1 produce work-product, perhaps, as you might be. I'm not
2 intending to produce work-product. The equipment will be
3 inspected formally, but we wanted an inspection to get our
4 arms around it.

5 And our arms tell us, Your Honor --

6 THE COURT: The inspection that you have is not the
7 person who's going to testify.

8 MR. CALLAGHAN: No.

9 THE COURT: Not the inspection that's going to be
10 used for trial.

11 MR. CALLAGHAN: Exactly, Your Honor.

12 THE COURT: This was like to help you figure out
13 how to manage the case.

14 MR. CALLAGHAN: This was like me going in there and
15 looking at it, but I would have looked at something and not
16 have a clue. So this was somebody assisting counsel.

17 The conclusion, generally, was -- and we disclosed
18 this in the interrogatories, is that about 95 percent of the
19 SFP transceivers were identifiable to what Tata returned to
20 HPFS India in India and that was ultimately sold to ICT. Of
21 that 95 percent of the transceivers, all of them are
22 authentic, according to our guys at --

23 THE COURT: In other words, you expect the evidence
24 to show that 95 percent of what's in that warehouse here,
25 that what purports to be what was returned -- seized and

1 returned by the Chinese authorities, 95 percent of one type
2 of receiver was what was received back by the India company,
3 and you believe it to be authentic.

4 MR. CALLAGHAN: We can establish that it's
5 authentic.

6 THE COURT: Five percent?

7 MR. CALLAGHAN: Five percent came from god knows
8 where, Your Honor. It didn't come from us, which raises a
9 whole bunch of questions, which are part of our counterclaim
10 that there was intermingling, that there was some dalliance.

11 THE COURT: So 5 percent, you don't -- you think is
12 not authentic.

13 MR. CALLAGHAN: It didn't come from us, and it
14 doesn't bear out as authentic on the tests applied.

15 THE COURT: So it wasn't what Tata returned to HP
16 India and you have reason to believe it wasn't what HP India
17 sold.

18 MR. CALLAGHAN: We have reason to believe it's not
19 what HP India sold.

20 THE COURT: All right. That's as to one category.
21 And as to the other category?

22 MR. CALLAGHAN: The other category was of a size
23 that was -- our guy didn't have the equipment to actually do
24 an electronic test of the other category so --

25 THE COURT: We don't know yet.

1 MR. CALLAGHAN: We don't know a hundred percent.
2 But what we're saying, Your Honor, is that that's an issue
3 that we think is crucial to at least the first seven counts
4 of the second amended complaint. It should be crucial to the
5 interests of the individual plaintiffs. It should be crucial
6 to the interests of ICT and all of the plaintiffs, because
7 the large part of this case is premised on the sworn
8 statement that they were sold counterfeit equipment in India
9 by our clients. We believe, and we believe we can share in
10 good faith under a 408-type analysis, that that's an issue
11 that we could talk through and maybe narrow the case.

12 There's two theories in the case. One is, we sold
13 counterfeit equipment, and we did so by fraud, by all sorts
14 of devices, and that the sale of that counterfeit equipment
15 resulted in all of the damages that happened.

16 There's a second theory in the case. The second
17 theory is that H3C made an allegation that the goods were
18 counterfeit, somebody came to a realization that that
19 allegation was either incorrect or equally that there was
20 parallel on the side of HPFS India for having sold
21 counterfeit equipment. So everybody closed ranks, circled
22 the wagons, and conspired to conceal any information
23 thereafter that might help the plaintiffs.

24 THE COURT: The coverup.

25 MR. CALLAGHAN: We believe that the inspection of

1 the equipment, that -- I'm not representing this, but it has
2 been said to the Court before that the plaintiffs themselves
3 never inspected the equipment. We've inspected the
4 equipment. We believe it could be established, and maybe
5 they should establish to their own liking, that the equipment
6 is not counterfeit. That gets rid of the entire first half
7 of the case. It doesn't get rid of the conspiracy theory,
8 because conspiracies can happen by mistake and the effects
9 could still be what they are.

10 We believe that a good faith discussion back and
11 forth, either under the Court's auspices or somebody --

12 THE COURT: So how -- what do you want to do?

13 MR. CALLAGHAN: I would like that to be the topic
14 of a conversation. I would like the individual plaintiffs to
15 be aware of the outcome of this finding and to actually
16 reason through the steps that would follow from that
17 conclusion.

18 THE COURT: Are you planning to have somebody look
19 at the second category?

20 MR. CALLAGHAN: We just need to get our arms around
21 the second category. And I'm remiss in that I don't have the
22 codes --

23 THE COURT: Do you think that needs to happen
24 before this kind of -- so what you're proposing is
25 essentially a mediation to try to resolve the first set of

1 claims, without any expectation that a resolution of that
2 would mean, by agreement or by motion, a resolution of the
3 second. In other words, you think maybe you could resolve
4 the first part, and that leaves the -- could be that there
5 could be a coverup, because people could have thought they
6 sold, or just that they were responsible in some way and
7 didn't want to get involved or have whatever motivations.
8 And so it would leave those claims for litigation.

9 MR. CALLAGHAN: Well, Your Honor, all I'm saying is
10 that we're not looking to eviscerate the case. We're not
11 saying this is an all or nothing. We're saying let's get
12 reasonable, because there's a scope to this thing that --

13 THE COURT: When do you want to do that, and how do
14 you want to do that?

15 MR. CALLAGHAN: If we could do it through the
16 auspices of the Court, I believe Rule 16.4 allows the Court
17 to appoint somebody by way of a mediator, or a semiarbiter
18 role, but somebody, a referee in the room to make us at
19 least --

20 THE COURT: So there's two -- there are a couple of
21 things. I guess one question would be whether the plaintiffs
22 were interested, and have you raised this with them before?

23 MR. CALLAGHAN: I haven't. But Your Honor, I
24 haven't gone through the morass we've gone through today. I
25 feel like it's an appropriate time to do so.

1 THE COURT: So let me -- I'll just -- some
2 practical comments on that. First, I mean, as a general
3 matter, I'm a big believer in people taking control of their
4 own destiny. And so one benefit of mediation is you have
5 control of your own destiny. And both of your clients --
6 this applies less to the individual claims, but both of your
7 clients are in business. And they, by and large, make their
8 money by selling products or making products, and not in
9 litigation. And so if they proceed in litigation, right,
10 they entrust their treasurer and the outcome of the case to
11 all of you to litigate it well, and then to me, in terms of
12 the rulings I make, and ultimately the jury. And you can
13 negotiate with each other, but not so much with the jury.
14 And I'm -- but you understand all that.

15 And so -- but that is a benefit that people lose
16 sight of: control. You have control in the settlement
17 process in a way that you don't in the litigation process.

18 So what I hear defense counsel basically saying is,
19 look, we think that there's a mechanism to settle part of the
20 case, not suggesting that that's any basis of -- what I hear
21 him saying is he doesn't think that you're at a place to
22 settle the second half of the -- the coverup type claims
23 that -- but he thinks there might be ground to settle the
24 first half.

25 I'd have to look at 16.4, because I haven't looked

1 at that in a long time. But the -- as a general matter, the
2 Court has a mediation program, which is available to you at
3 any point in time. The mediation program is essentially the
4 magistrate judges of the court. And if what you're -- so as
5 a general matter, I would not refer you to the mediation
6 program to meet with a magistrate judge, unless you both
7 wanted to go. The reason is, I wouldn't want to waste your
8 time, your client's money, and the magistrate judge's time.

9 So one question would be, do you both want to go.
10 And you don't -- you could think about that. And so
11 essentially --

12 I don't know if you -- you're from here, right,
13 Mr. McGuire?

14 MR. MCGUIRE: I am, Your Honor.

15 THE COURT: So I don't know if you've participated
16 in the mediation program here or not.

17 MR. MCGUIRE: I have.

18 THE COURT: You have, right. So in any event, for
19 those of you from out of town, who probably haven't with our
20 program, you go to one of the magistrate judges. Unless you
21 express a preference, you would be randomly assigned. If you
22 expressed a preference and you want a particular person, I
23 would make sure that's the person you got. If you didn't --
24 you said "anybody but," I would make sure you had anybody
25 but. If you had no preference, then I would either leave it

1 to random, or I would think about whether I thought someone
2 was particularly well-suited and matched to doing this case
3 and then I would send it off.

4 You would then need to submit, just like in a
5 private mediation, or whatever, nondocketed, confidential
6 mediation statements. You wouldn't see each other's
7 statements. And I would never see them, because they're not
8 on the docket. They would go to the magistrate judge.

9 You would meet with the magistrate judge. You'd be
10 together for a little while, he or she would put you in
11 separate rooms, go back and forth. It's typically most of
12 the day. You either resolve -- your clients would have to be
13 there on your side, or a corporate client representative, and
14 for you a representative or the individual defendants. And
15 sometimes there's -- usually if there's follow-up, because it
16 doesn't always resolve, but sometimes people need to go back
17 and think about it or check on things, and you might have
18 follow-up phone calls. Occasionally, but rarely you'd have a
19 second session.

20 So I'm perfectly content if you want to do that.
21 I'm fine with that. If you both want to do that, I think
22 it's reasonable, a reasonable course. I would think that the
23 claims arising out of the sale of the goods are likely to
24 turn heavily on what are the goods and what is the evidence
25 regarding the chain of custody of the goods at different

1 points in time. In other words, what is the evidence -- I
2 guess the chain probably starts when Tata sent it back to HP,
3 and he ordered the records of what came back.

4 What was the records of what was received by the
5 plaintiff, what's the evidence of what was received then, and
6 what are the records of what happened to it along the way.
7 And then what are the records that show what it was, you
8 know, when -- or what's the evidence when it went to the
9 Chinese authorities, and what's the evidence, if any of it
10 is, about what the Chinese authorities did with it and stored
11 it. And what's the evidence of what came back and what
12 evidence of inspections? You understand.

13 So that's, you know, a big factor in what's going
14 to, I would think, determine those claims, you -- what it
15 looks like now is going to be an important aspect of that.
16 And certainly, it would seem likely that if there was
17 contamination introduced along the way, the contamination
18 would be nonauthentic or different devices. The likelihood
19 of people interjecting authentic devices into it seems not
20 theoretically impossible, but rather remote.

21 So I'm open to it. I suppose -- I guess I would
22 want to know what, Mr. Joffe and Mr. McGuire, you thought
23 about it, or whether you want to talk to your clients about
24 it. Or probably what I would suggest --

25 MR. JOFFE: We do.

1 THE COURT: Yes. You talk to each other about it a
2 little bit of what you're thinking about it, or what
3 Mr. Callaghan is thinking about it, and then talk to your
4 clients and then see. And I would be open to any of the
5 following:

6 I would be open to you go off to it and continue on
7 discovery, if that's what you want to do. I would be open to
8 it, you go off, but pause this to see if it -- and then come
9 back. And if it resolved part of it, you would still be
10 doing discovery, but maybe that would narrow what you do.
11 Maybe not.

12 It doesn't -- I don't see that -- off the top of my
13 head, I don't see why it would change any -- if you resolve
14 part of it, the other claims still stand. But so I would be
15 open to either way.

16 So I guess what I would say, talk to each other,
17 and then what I would say is file a joint status report with
18 me. It can be longer, if you want, but for my purposes, it's
19 enough if you either say, in one sentence, we all want to go,
20 and if you have a preference on who you want, tell me, and
21 this is what we want to do in discovery. Or we don't all
22 want to go.

23 If you don't all want to go, I'm probably not going
24 to -- I'm not going to send you, unless you give me a really
25 good reason that makes this the rare and unusual circumstance

1 why I should do that.

2 If you both want to go, but don't agree on what
3 should happen in discovery, say you both want to go, and tell
4 me what your views are, like briefly, like why discovery
5 should continue or why it shouldn't.

6 But I will tell both of you, one of the things that
7 would -- that would make me think is it should just happen
8 faster, the mediation. In other words, rather than having a
9 big fight about whether the discovery should proceed or not,
10 why not just go to the mediation sooner. Because, really, a
11 one-week pause is really irrelevant. It would be difficult
12 to argue about that. A four-month pause for it would be
13 different.

14 So really what I would understand you partially
15 telling me is, like, Judge, can you get a magistrate judge to
16 do it very soon, so we don't -- one of us doesn't want to
17 pause discovery, so we don't have to do that. And -- or, you
18 know, something like that.

19 So that just -- in full disclosure, that's one of
20 the things that I think -- but I recognize there's certain
21 scheduling on your parts and your client parts.

22 Any other questions about that?

23 So I guess the question from you would be, when do
24 you want to file that joint status report? How much time to
25 talk to each other, talk to your clients, confer back with

1 each other, and then decide what you want to tell me about
2 that?

3 MR. CALLAGHAN: A couple of weeks.

4 MR. JOFFE: A couple of weeks. Yeah.

5 THE COURT: You tell me, two weeks? Three weeks?
6 Four? I mean, it's really up to all of you.

7 MR. JOFFE: Let's do four.

8 MR. CALLAGHAN: Four. Mr. Joffe suggests four. I
9 have no objection.

10 THE COURT: Fine.

11 MR. CALLAGHAN: My only question is, I guess we
12 have the other homework to do in the meantime, as we go
13 forward in the meantime, until we either conclude that we're
14 going to do that or not?

15 MR. JOFFE: Yeah.

16 THE COURT: I guess I would say this: Tell me in
17 four weeks. You don't have to wait four weeks. If you
18 resolve it sooner, you can tell me sooner.

19 MR. JOFFE: If we decide before that.

20 THE COURT: If you -- the sooner -- the one thing
21 that you should understand is that until you tell me you want
22 to do it, I'm not going to arrange a magistrate judge to do
23 it.

24 MR. MCGUIRE: Uh-huh.

25 THE COURT: So -- and there's going to be a certain

1 lead time on getting somebody. You're not going to get
2 someone in a week.

3 Is that the kind of thing you were thinking about,
4 Mr. Callaghan? Or were you thinking something else?

5 MR. CALLAGHAN: No, Your Honor, that would be
6 ideal. And I think that would allow us all to sort of look
7 soberly at the larger picture and see whether or not there's
8 a wider or narrower case to go forward with.

9 The one last thing I would ask, from a housekeeping
10 perspective, is we have certain deadlines in our scheduling
11 order that are coming up, and simply by dint of this ESI
12 conference and what we're talking about doing going forward,
13 we may need a little more latitude on the deadlines just to
14 accommodate these decisions.

15 THE COURT: A couple things to think about with
16 that. One, you should confer with each other and propose --
17 if you want to amend the deadlines, propose a simple -- like
18 this is what the revised schedule should look like. If
19 you're in agreement, you're more likely to get a positive
20 result than if you're not, though, I'm not saying I wouldn't
21 do it either way.

22 But the second thing, you should just -- I will
23 tell you, that is in the back of my mind about this case, is
24 that I think about the -- one of the things that I think
25 about in scheduling trials and scheduling cases. So I think

1 it's -- I tell you, because I think it's fair for you to
2 know, because it's in my mind, is when was the case filed and
3 when will it go to trial? In other words, how long? And so
4 right now, this case is a ways, somewhat, from trial, and --
5 because you're still at the beginning of discovery. You have
6 to go through all this, assuming --

7 I operate on the assumption that we actually try
8 all the cases, and recognizing that isn't going to happen.
9 But I address each case as if it's going to go to trial. And
10 so you have ahead of you a fair bit period for discovery, and
11 then you have a period, I think, for experts, right? And
12 then this is the kind of case I imagine that defendants are
13 likely to try to seek summary judgment, so they're going to
14 file a summary judgment motion.

15 And I would imagine you're likely to oppose that
16 summary judgment motion. And I don't know whether there
17 would be any claims on which you would move for summary
18 judgment.

19 But either way, there's going to be summary
20 judgment if the 12(b)(6) litigation is any preview of summary
21 judgment, it's likely to be hotly contested and heavily
22 papered. And so it will take you some time to prepare those
23 briefs, and it will take me some time to resolve it.

24 And then if the case goes to trial after that, if
25 it doesn't all go away on -- one or both, whatever summary

1 judgement motions, you'll need a certain amount of time
2 before we can try it, just because you need a little bit of
3 time to be ready.

4 Although you should understand that I don't
5 schedule cases for trial, ordinarily, until one of two
6 events. Either I resolve -- in a civil case, I resolve the
7 summary judgment motion, and then I know it's going to trial.
8 Or you come to me at the end of discovery and say: We're not
9 going to had have summary judgment. We might still need to
10 do expert discovery, but there aren't going to be any summary
11 judgment motions. Then I would talk to you about a trial
12 date.

13 The result of that is I don't have a calendar
14 filled with trial dates that aren't real. So the only cases
15 that I have scheduled for trial are ones that are pretty
16 likely -- some settle -- but are pretty likely to go. So
17 when I, let's say, resolve the summary judgment motion, the
18 honest answer as to when does Judge Sorokin want to try the
19 case, it's usually 45 days later, 30 days for you to have all
20 the --

21 Now, I -- I rarely would schedule trials 45 days
22 later, because I think that's unfair to all of you. You need
23 not only the 30-day ramp-up in the standard pretrial order
24 that I and the other judges in this court typically uses for
25 filling, but you need more than 15 days to get ready for

1 that. And I recognize that -- reluctantly, that I'm not the
2 only judge before whom you have cases.

3 So I'm likely -- and this case, I don't know how
4 long it will be, but this might not be a four-day day trial.
5 So I might talk to you about it. I might just schedule
6 trial, but it isn't going to be -- ordinarily, I wouldn't
7 think seven months later. I'd be thinking promptly, because
8 I'd be ready to go and you would be ready to go, except for
9 putting together your pretrial filings and any scheduling
10 logistics that arose.

11 So I circle back to your request, because I'm
12 thinking about, a little bit, the end date and how far out
13 that is, and I think about that when people come to me. I
14 try to be reasonable about giving extensions, and I'm likely
15 to give you a reasonable extension, given where we are and
16 what's transpired and the dates. But I do think about that.
17 And I tell you that because, although I'm not of the school
18 of thought that at the Rule 16, schedule a trial, some people
19 confuse that. They confuse that for meaning that I'm not
20 interested in moving the case promptly and that it's no
21 worries, it's a long way away. That's not the case.

22 And the case is, I intend to -- I don't always move
23 as quickly as I would have liked, and -- but I'm thinking
24 about that, it's going to go to trial, unless you resolve it
25 or I resolve it on a dispositive motion. And I have that in

1 my mind. So just think about that, in terms of -- I think
2 about that, in terms of the end date, because I'm -- that's
3 in my mind on every motion to continue the schedule.

4 Did you have anything else, Mr. Callaghan?

5 MR. CALLAGHAN: I don't believe so, Your Honor.

6 THE COURT: Do you have anything, Mr. Joffe?

7 MR. JOFFE: I do have one thing.

8 THE COURT: All right.

9 MR. JOFFE: And I overlooked it, I'm sorry, Your
10 Honor.

11 We were discussing our custodians that we
12 requested, and we stopped at Schultz, Whitman, and McCarthy.

13 THE COURT: Yes.

14 MR. JOFFE: There are two Chinese representatives.
15 They are listed on page 19 of the joint article, on the very
16 top, James Kwon and Meng Tao.

17 THE COURT: Yes.

18 MR. JOFFE: And we propose to have them as
19 custodians. James Kwon was from HP China, which was, at the
20 time, it was a direct -- I'm sorry, it was a wholly-owned
21 subsidiary of H3C. And H3C, at that time, was also a
22 subsidiary of HP. And Meng Tao was a representative of H3C.
23 So those are two people who, according to defendants' initial
24 disclosures and according to our complaint, those are the
25 ones who were both inspecting those transceivers back in

1 China in 2013, they were reporting that all of those
2 transceivers --

3 THE COURT: What's your position about them?

4 MR. JOFFE: And we would like to have the
5 electronic data, to the extent HP has it.

6 MR. CALLAGHAN: Yeah, Your Honor, just on the
7 actual custodian list itself, "Mr. Kwon" is actually "Kwok,"
8 K-w-o-k. That was --

9 THE COURT: Yes, that's fine, I see that.

10 MR. JOFFE: Okay. Okay. Right.

11 MR. CALLAGHAN: My understanding is he was an HP
12 China employee. Meng Tao, I believe, also was an HP China
13 employee, rather than an H3C employee. We did disclose, and
14 it's our understanding that -- and Paul is better able to
15 speak to this than I am. But there's a common server for HP
16 e-mail, and even though --

17 THE COURT: Whatever, at that time.

18 MR. CALLAGHAN: At that time. Even though HP China
19 is a separate corporate entity and not a party to this
20 litigation, by their choice, not ours, we believe we can do a
21 search of e-mails of those individuals that would be
22 responsive, and we're willing to do so.

23 MR. JOFFE: Okay.

24 MR. CALLAGHAN: But Meng Tao, my understanding
25 is -- and this is from memory. I don't believe Meng Tao is

1 associated with any of the HP entities anymore, anyway. And
2 I think the same might be true for Kwok, but I'm not certain.
3 So to the extent that there's something on the common system
4 that's responsive, very good; but we're not standing here
5 saying to Your Honor that we're compelling HP China or that
6 we're reaching through the corporate separateness to get HP
7 China folks to be responsive. That's not how it's going to
8 be done. It can be done practically, I believe, through the
9 existing HP --

10 THE COURT: So the e-mail -- you believe that the
11 e-mail would have whatever e-mail they sent.

12 MR. CALLAGHAN: We believe so, Your Honor. That's
13 our understanding. And if that understanding changes, we
14 will let Mr. Joffe know.

15 MR. JOFFE: Right. If they include it, then, in
16 your search as custodians for those e-mails, that's fine,
17 yes.

18 MR. CALLAGHAN: Yes. And we're willing to do that
19 practically, but we want to be clear that it's not as if
20 we're responding for queries addressed to employees or
21 individuals associated with a separate corporate entity, who
22 you chose not to include as a party.

23 THE COURT: Right.

24 MR. CALLAGHAN: And that is not true, just so you
25 know, Your Honor, there was no commonality between the HP

1 e-mails and the H3C e-mails. You'll recall what we
2 previously pointed out, that H3C was an island unto itself in
3 China and that it was --

4 THE COURT: But neither of these people work for
5 H3C.

6 MR. CALLAGHAN: To my knowledge, no, Your Honor.
7 They were HP China.

8 MR. JOFFE: HP China.

9 THE COURT: And that satisfies you?

10 MR. JOFFE: Yes, with that explanation and the
11 inclusion of the e-mails.

12 THE COURT: All right. Do you have anything else,
13 Mr. Joffe?

14 MR. JOFFE: I don't. Thank you, Your Honor. I'm
15 grateful for your directions.

16 THE COURT: All right. Thank you very much. We're
17 adjourned.

18 THE DEPUTY CLERK: All rise, this matter is
19 adjourned.

20 (Court in recess at 4:43 p.m.)
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CERTIFICATE OF OFFICIAL REPORTER

I, Rachel M. Lopez, Certified Realtime Reporter, in and for the United States District Court for the District of Massachusetts, do hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing pages are a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 1st day of June, 2018.

/s/ RACHEL M. LOPEZ

Rachel M. Lopez, CRR
Official Court Reporter